232051

GKG Law, P.C.

ATTORNEYS AT LAW
CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007
TELEPHONE: 202.342.5200 FACSIMILE: 202.342.5219

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B YOUNGER •

SVETLANA V LYUBCHENKO

ROBERT N KHARASCH*

* OF COUNSEL
• NOT ADMITTED IN DC

MINNESOTA OFFICE
700 TWELVE OAKS CENTER DRIVE, SUITE 700
WAYZATA, MN 55391
TELEPHONE 952 449 8817 FACSIMILE 952 449 0614

WRITER'S DIRECT E MAIL ADDRESS
TWILCOX@GKGLAW COM

WRITER'S DIRECT DIAL NUMBER
202-342 5248

March 13, 2012

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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: ***Canexus Chemicals Canada, L.P. v. BNSF Railway Company*, STB Docket No. NOR 42132**

Dear Ms. Brown:

Enclosed for e-filing in the above-captioned Docket, please find the Reply Evidence of Canexus Chemicals Canada, L.P. ("Canexus"). Canexus is filing both a Highly Confidential and Public Version of its Reply Evidence. Highly Confidential and Confidential Information is redacted from the Public Version and is denoted with brackets [ ] in the Highly Confidential Version. Pursuant to the Board's e-filing procedures, Canexus is filing the Highly Confidential Version under seal.

Canexus is also hand-delivering to the STB today three (3) copies of a compact disk to accompany this filing, which contain the electronic workpapers of Canexus' witnesses Mr. Thomas D. Crowley and Mr. Charles A. Stedman.

Please feel free to contact me with any questions.

Regards,

Thomas W. Wilcox

Thomas W. Wilcox
Attorney for Canexus Chemicals Canada, L.P.

Enclosure
cc: Counsel for BNSF Railway

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA, L.P.	)	
Complainant,	)	
v.	)	Docket No. NOR 42132
BNSF RAILWAY COMPANY	)	
Defendant.	)	

COMPLAINANT'S REPLY EVIDENCE

Thomas W. Wilcox
Edward D. Greenberg
Svetlana V. Lyubchenko
GKG Law, P.C.
1054 Thirty-First Street, NW, Suite 200
Washington, DC 20007
Phone: 202-342-5248
Fax: 202-342-5222

Attorneys for Complainant Canexus Chemicals Canada, L.P.

March 13, 2012

PUBLIC VERSION

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COMPLAINANT'S REPLY EVIDENCE

Complainant Canexus Chemicals Canada, L.P. ("Canexus") hereby submits its Reply Evidence in this proceeding. This Reply Evidence consists of two parts: (a) Counsel's Argument addressing the legal and other issues raised by defendant BNSF Railway Company's ("BNSF") opening evidence and summarizing Canexus' Reply Evidence submission; and (b) the Reply Verified Statement of Mr. Thomas D. Crowley and Mr. Charles A. Stedman, President and Vice President, respectively, of L.E. Peabody & Associates, Inc. ("Crowley/Stedman Reply VS"), providing written testimony and evidence in support of Canexus' Reply Evidence. This Reply Evidence demonstrates (1) Canexus' Final Offer Comparison Groups are the most similar, in the aggregate, to the issue movements; (2) the challenged rates are presumptively unreasonable; and (3) the presumptively maximum reasonable rate levels produced by properly applying the Three-Benchmark methodology should not be increased due to the presence of any "other relevant factors" as that term is defined and applied under the *Simplified Standards* and Board precedent.

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Complainant,	)	
v.	)	Docket No. NOR 42132
BNSF RAILWAY COMPANY	)	
Defendant.	)	

PART I – COUNSEL'S ARGUMENT

The issue presented to the Board in this case is whether the huge increases in the common carrier rail rates BNSF charged for the issue traffic for transportation commencing March 16, 2011 were reasonable. As allowed under the Board's rules and policies, Canexus has elected to test the reasonableness of those rate increases under the Three-Benchmark methodology set forth in *Simplified Standards*[1] and applied by the Board in four cases to date. These rules are, by intention and design, simplistic and easy to administer given that the total damages are capped at $1,000,000 ($1,136,855 as adjusted).

In its Opening Evidence, BNSF has (1) included traffic data that the Board ruled could not be used in this proceeding; (2) advanced arguments and evidentiary claims that have been rejected by the Board and the United States Court of Appeals for the District of Columbia Circuit; (3) proposed adjustments to the presumptively maximum reasonable rate levels that the

[1] *Simplified Standards for Rail Rate Cases* (served September 5, 2007); *recon. denied* March 19, 2008; *aff'd, CSX Transportation, Inc. et al v. Surface Transportation Board*, 568 F.3d 236 (D.C. Cir. 2009).

Board has previously ruled are not permissible in a Three-Benchmark case and which violate the Board's clear prohibition on movement-specific adjustments to URCS variable costs; and (4) has otherwise sought, as have railroad defendants in prior Three-Benchmark proceedings, to greatly expand the scope and complexity of the application of the Three-Benchmark rules. The Board has resisted the efforts of prior railroad defendants to expand the limited scope and purpose of the Three-Benchmark rules, and so far it has rejected BNSF's attempts to do the same in this case. For the reasons discussed in this Reply Evidence, the Board should also reject these further attempts by BNSF to expand the scope and complexity of the Three-Benchmark rules.

I. PRELIMINARY ISSUES

BNSF's Opening Evidence contains a narrative of BNSF's purported justifications for significantly raising the rates for the issue movements, and its rates for Canexus' movements nearly 100% on average, starting March 16, 2011. This explanation is largely a regurgitation of its denied Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group ("BNSF Motion"), which described how BNSF allegedly decided to increase TIH commodity rates across the Board due to a purported regulatory and market "sea change" brought on by (1) BNSF's alleged realization that it was charging "below market" rates for TIH transportation; (2) allegedly burdensome and costly regulations applying to TIH commodities; and (3) allegedly high insurance costs. BNSF Op., Exhibit 1, Garin V.S. As an initial matter, such general excuses for challenged rate levels being significantly higher than previous levels are not relevant in a Three-Benchmark proceeding and have nothing at all to do with whether the challenged rate levels are calculated to be presumptively unreasonable by application of the Three-Benchmark test. The fundamental premises of the Three-Benchmark rules, in addition to them being, by design, simple and inexpensive, are that (1) whether a

challenged rate is presumptively unreasonable is to be determined by application of the Three-Benchmark methodology, which uses the Board's confidential Waybill Sample data provided to the parties at the outset of the case; and (2) a party seeking to increase (or decrease) the presumptive maximum reasonable rates produced by that methodology must do so with *quantified* evidence of "other relevant factors" that provide the Board with an objective, transparent means of adjusting the maximum lawful rate upwards or downwards. *Simplified Standards* at 77. *See* Docket No. 42099, *E.I. DuPont de Nemours and Co. v. CSX Transp., Inc.* (served June 20, 2008) ("*DuPont*" at 17) ("Parties are required to quantify the impact of these 'other relevant factors' on the maximum lawful rate.").

The Board has already issued two rulings in this case entirely consistent with these premises. First, in a decision served February 2, 2012, the Board ruled that "discovery related to the rates, pricing structures, or practices of other carriers simply has no bearing on the maximum lawful rate that BNSF may charge Canexus for the movements at issue," thereby rejecting the notion that BNSF could claim the issue rates are reasonable by comparing BNSF's rate increases effective March 16, 2011 to rates of other railroads. Second, in a decision served February 8, 2012, the Board also rejected BNSF's attempt to entirely circumvent the application of the Three-Benchmark rules - and have the challenged rates treated as presumptively reasonable - by using BNSF 2011 TIH traffic data in its comparison groups.[2]

In addition to being irrelevant, the generalized reasons BNSF asserts for why the challenged rate levels are 100% above prior levels are highly questionable. For example, BNSF

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[2] Despite the Board's denial of the BNSF Motion, BNSF has included the rejected 2011 traffic data in its Opening Evidence, and Canexus has moved to strike this material. Because BNSF has impermissibly included this material in its Opening Evidence, Canexus has not addressed it, and has confined this Reply Evidence to critiquing issues related to BNSF's opening "alternate" comparison group and BNSF's proposed adjustments based on alleged "other relevant factors."

claims that it was compelled to raise all TIH rail rates across the board in 2011 due to burdensome and costly regulations. BNSF Op. at 15-16. Canexus specifically asked for materials in discovery supporting BNSF's strident claims in the BNSF Motion that the costs and burdens of regulatory compliance justified its rate increases. Not one document produced by BNSF contained any information quantifying such costs or analyzing - or even complaining about - the associated burdens of any of the regulations cited in BNSF's Opening Evidence and previously in the BNSF Motion. On the contrary, documents BNSF produced confirmed that even though BNSF concluded that some new regulations would result in increases in handling and mileage of TIH traffic, [

] Counsel's Exhibit 2.[3]

In summary, despite BNSF's attempts to complicate this case with an irrelevant and self-serving narrative of its justifications for the challenged rate levels, the proper analysis is to select an appropriate final offer comparison groups for the issue movements prepared using the 2006-2009 Waybill Sample data provided to the parties, apply the Three-Benchmark methodology, and to assess the validity of BNSF's proposed "other relevant factors" adjustments to the maximum reasonable rate levels produced by application of the Three-Benchmark methodology utilizing those comparison groups.

[3] Canexus addresses BNSF's claims about insurance costs in Section III.C. refuting BNSF's proposed "other relevant factors" adjustments.

II. CANEXUS' "FINAL OFFER" COMPARISON GROUPS SHOULD BE SELECTED BY THE BOARD AND APPLICATION OF THE THREE-BENCHMARK RULES UTILIZING THE FINAL OFFER GROUPS DEMONSTRATES THAT THE CHALLENGED RATES ARE PRESUMPTIVELY UNREASONABLE

Under *Simplified Standards*, each party submits in its initial evidence its proposed appropriate comparison group for the movement coinciding with the challenged rate. This can be followed by a technical conference with Board staff "to discuss and resolve any disputes as to the appropriateness of movements in the comparison groups." *Simplified Standards* at 18. In this case Board staff did not convene such a conference. On Reply, each party tenders its "final offer" comparison groups. Only movements that are submitted by either party on opening may be included in the final offer groups. Any movement included in both opening groups must be included in both party's final group unless they agree to exclude it. *Id.*

While Canexus believes its opening comparison groups are clearly superior to BNSF's opening single comparison group and sufficiently comparable to the issue movements to be selected by the Board, Canexus' final offer comparison groups contain elements of both parties' opening submissions that utilized the 2006-2009 Confidential Waybill Sample data provided to the parties at the outset of the case in order to introduce some overlap between the parties' respective positions. Canexus believes its inclusion of some aspects of BNSF's 2009 comparison group further strengthens the overall acceptability of Canexus' "final offer" comparison groups.

A. Commonalities Between the Parties' Opening Comparison Groups

BNSF and Canexus used different criteria in selecting their opening comparison groups from the 2006-2009 Confidential Waybill Sample provided to the parties at the outset of the case. It therefore follows that there were few direct overlaps between the two presentations. Only one BNSF movement appears in both parties' presentations; a single line chlorine

movement that is contained in Canexus' comparison group for Albuquerque and BNSF's single comparison group made up of 2009 BNSF chlorine movements. Crowley/Stedman Reply VS at 8.

B. Differences Between the Parties' Opening Comparison Groups

1. Waybill Data Used; Number of Groups

Canexus utilized all four years of the 2006-2009 Confidential Waybill Sample Data provided to the parties and assembled a comparison group for each issue movement. BNSF elected to assemble a single comparison group from only the 2009 data.[4] Moreover, in accordance with the Board's rules, Canexus excluded the Albuquerque issue movement from the Albuquerque Movement comparison group, and excluded the Glendale movement from the Glendale Movement comparison group. BNSF, because it chose to present a single comparison group, omitted both movements from its comparison group.

2. Commodities

Canexus' opening comparison groups contain BNSF movements of other TIH commodities in addition to BNSF chlorine movements. BNSF's single comparison group consists only of chlorine movements.

3. Tank Car Size

Because Canexus' opening comparison groups include all TIH commodities, they included movements that utilize tank cars with capacities less than and greater than 22,000 gallons. Because BNSF chose to utilize only chlorine movements in its opening comparison

[4] By Decision served March 12, 2012 in EP 646 (Sub-No. 3), *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, the Board affirmed the appropriateness of utilizing all four years of the Waybill Sample data ("*March 12 Decision*").

group, BNSF's movements utilize tank cars that are less than 22,000 gallons in capacity. BNSF Op. at 49, 53-54; Crowley/Stedman Reply VS at 14.

4. Length of Haul

The miles for issue movements are 2091 (Glendale) and 2194 (Albuquerque). In assembling its comparison groups, Canexus utilized a mileage range of plus or minus 700 miles, for the reasons discussed in its Opening Evidence. Canexus Op. at 10. In contrast, BNSF utilized a mileage range that resulted in its single comparison group containing movements as low as [ ] miles and as high as [ ] miles. BNSF Op. at Exhibit 8, Crowley/Stedman Reply VS at 13.

5. Local vs. Rebilled Movements

Consistent with Board precedent, Canexus' opening comparison groups consist of only single line, "BNSF local" movements, since BNSF represents that the two movements are "BNSF direct" and therefore single line movements for pricing purposes. Crowley/Stedman Reply VS at 15. In its opening single comparison group, BNSF included single line movements and interline, or "rebilled" movements.

C. Canexus' Final Offer Comparison Groups for the Issue Movements

Summarized below are the selection criteria utilized by Canexus to select its final offer comparison groups for use in this case. A detailed discussion of each criteria is included in the Crowley/Stedman Reply VS at pages 7-17, as well as in Canexus' Opening Evidence.

1. Waybill Data Used; Number of Groups

Canexus' final offer comparison groups continue to utilize all four years of the 2006-2009 Confidential Waybill Data provided to the parties. Canexus also continues to exclude issue movements from their respective comparison groups. BNSF's use of a single comparison group

for both movements unnecessarily reduces the sample size of comparable movements available to perform the Three-Benchmark analysis. Crowley/Stedman Reply VS at 11; *See March 12 Decision* at 5 ("one year of data may in some cases be insufficient to provide a meaningful benchmark for comparison," noting particular concern with TIH commodity movements.) However, in order to introduce some overlap between the parties' respective positions, and to the extent permitted by the Board's rules, Canexus has included in its final offer comparison groups all of the 2009 single line chlorine movements BNSF included it its opening comparison group, but were excluded from Canexus' opening comparison groups because they were outside the mileage band criteria chosen by Canexus. *Id.* at 16-17. This results in a slight increase in the maximum R/VC ratios produced by Canexus' opening comparison groups. Because BNSF did not utilize the 2006-2008 Waybill Data on opening, movements from those years are not included in Canexus' final offer comparison groups. *Id* at 17, note 21.

2. **Commodities**

Canexus' final offer comparison groups continue to contain single line movements of chlorine and other TIH commodities on BNSF drawn from the 2006-2009 Waybill Sample provided to the parties. In the only other Three-Benchmark cases involving challenges to chlorine rail rates, the Board selected final offer comparison groups proposed by the complainants which included both chlorine and other TIH commodity movements by the defendant railroad. *DuPont, supra*; *US Magnesium L.L.C. v. Union Pacific R.R. Co.*, STB Docket No. 42114 (served Jan. 28, 2010)("*USM*"). Consistent with these prior cases and the facts of this particular case, Canexus' opening comparison groups appropriately included chlorine and other TIH commodities. BNSF's Opening Evidence constitutes yet another attempt by a defendant railroad to have the Board accept a comparison group consisting solely of

chlorine movements. This is supported in part by a lengthy narrative discussion of why BNSF did not include anhydrous ammonia shipments in its comparison group. BNSF Op. at 45-50.

However, the reasons BNSF advances in support of its chlorine-only comparison group are exactly the same arguments that the Board first rejected in *DuPont*. Specifically, BNSF argues that because of "substantially different demand and transportation of chlorine and anhydrous ammonia" it would be "inappropriate to expand the comparison group to include shipments of commodities other than chlorine, particularly anhydrous ammonia." *Id.* at 45. BNSF further argues that while rail transportation is "by far the predominant mode of transportation for chlorine," in contrast, "less than half of the anhydrous ammonia that is used for industrial purposes is shipped by rail; whereas barges, pipelines and trucks are responsible for most anhydrous ammonia transportation." *Id.* at 48. BNSF also maintains that while both products are toxic, "the risks associated with the release of chlorine are substantially greater given the relatively low concentrations of chlorine in the air required to cause injury." *Id.* All these previously rejected arguments, however, are unsupported by any new or different evidence, and Canexus has again refuted them in this reply evidence. *See* Crowley/Stedman Reply VS at 11-13.[5] After considering and rejecting these arguments in *DuPont*, the Board determined that the appropriate comparison group in that case was the group proposed by the complainants consisting of all TIH commodity movements. In so deciding, the Board stated, "[w]e conclude that a more appropriate comparison group should include all TIH shipments, rather than a

[5] More recently, in *USM*, UP tried to rehash CSXT's arguments in *DuPont*, representing that: (1) chlorine is in a very different product market than anhydrous ammonia and other TIH materials handled by UP (*USM*, UP Opening Evidence at 26); (2) anhydrous ammonia sometimes moves in transportation modes other than rail (*Id.* at 27); and (3) chlorine is "an especially dangerous commodity" (*Id.*). As noted above, despite these arguments, the Board selected the complainant's comparison groups.

narrowly tailored group of chlorine shipments alone,"[6] and "[c]hlorine is indeed a dangerous chemical, and accidents expose railroads to litigation risk. But there are many other dangerous chemicals, and we believe that a broader comparison group that includes these other TIH chemicals would provide a more reasonable guide for the contribution of joint and common cost that the movements at issue should bear."[7]

In its Opening Evidence, BNSF attempts to seize upon *dicta* in *USM* expressing the concerns of the majority of the Board and the dissenting Commissioner over the low percentages of chlorine movements in the complainant's comparison groups the Board eventually selected, which were 4% in one group and 1% in the other. *USM* at 4-5. In comparison, anhydrous ammonia movements made up 79% and 88% of the final *USM* comparison groups' movements, respectively.[8] *Id.* The Board also stated that, under the specific facts of that case "there is evidence here of the differences in risk in demand between chlorine traffic and anhydrous ammonia." *Id.* at 8 (emphasis supplied). In *dicta*, the Board acknowledged in *USM* that in *DuPont* it had concluded, under the circumstances of that case, "a more appropriate comparison group should include all TIH shipments, rather than a narrowly tailored group of chlorine movements alone," *Id.*, but the Board declined to extend that statement to "a comparison group that [the Board believed] has been narrowly tailored to almost exclusively anhydrous ammonia movements." *Id.*[9]

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6 *DuPont* at 8.

7 *Id.* at 9.

8 The other TIH commodities were Ethylene Oxide and Hydrogen Fluoride. *Id.*at 8-9.

9 In refuting the complainant's reliance on *DuPont*, the Board noted four differences (1) the fact that the *DuPont* comparison groups "consisted mostly of chlorine traffic"; (2) the defendant had improperly proposed groups consisting only of movements that included a fuel surcharge; (3) the defendant had stated it set its rates "based not on profit maximization but rather on risk avoidance"; and as stated previously (4) the Board had concluded based on the

The concerns that prompted the Board's *dicta* in *USM* are not present in this case. In the first place, as described further by Messrs. Crowley and Stedman, Canexus' final offer comparison groups (as were Canexus' opening groups) have been assembled to contain significantly higher percentages of chlorine movements than the comparison groups that gave the Board concern in *USM*. Specifically, 69% of the movements in the final offer comparison group for Albuquerque are chlorine movements, and 26% of the movements in the final offer comparison group for Glendale are chlorine movements. Crowley/Stedman Reply VS at 16-17, Exhibits 8 and 9.

Secondly, unlike in *USM*, the facts of this particular case show that, as to BNSF, the inclusion of anhydrous ammonia movements in Canexus' final offer comparison groups is entirely appropriate because the included BNSF anhydrous ammonia movements are comparable to the included chlorine movements. Significantly, as demonstrated by Messrs. Crowley and Stedman, the range of R/VC ratios for the chlorine movements in Canexus' final offer groups is *identical* to the R/VC range for the anhydrous ammonia movements. Crowley/Stedman Reply VS at 11-12. This is *prima facie* evidence that BNSF considers the demand, risk, and transportation characteristics of the two commodities to be very similar, if not the same. Thus, the distortive effect on R/VC ratios that the Board concluded occurred with the inclusion of anhydrous ammonia movements in the complainant's comparison groups in *USM* is not present here. *USM* at 9.

Additionally, despite BNSF's statements that the commodities are priced by two different marketing groups within BNSF, public BNSF materials demonstrate that the railroad appears to treat chlorine and anhydrous ammonia the same without regard to who within BNSF markets

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record of *USM*, which involved Union Pacific Railroad Company, that there was evidence there of differences in risk and demand between chlorine traffic and anhydrous ammonia. *Id.* at 7-8.

them. For example, in 2007, BNSF announced a program for providing discounted rates to all shippers who transport TIH/PIH commodities in improved tank cars that meet the latest DOT specifications. This by itself suggests that in implementing a pricing strategy, BNSF treats the movement of TIH shipments as a whole on BNSF's system, without singling out chlorine. Moreover, BNSF set two different deadlines for shippers to furnish fleet information to enable BNSF to rate/audit shipments and determine applicable retroactive discount credits: one for chlorine and anhydrous ammonia (October 31, 2007) and the other for all other TIH/PIH shippers (October 31, 2008). This provides further indication that BNSF attributes similar characteristics to chlorine and anhydrous ammonia movements.[10]

In contrast, none of the documents produced to Canexus in discovery by BNSF contained any discussion, analysis, or other indication that chlorine and anhydrous ammonia are treated differently within BNSF from a demand elasticity or risk assessment standpoint.

In summary, Canexus' inclusion of anhydrous ammonia movements in its final offer comparison groups is consistent with established Board precedent and the particular facts of this case. BNSF's rehash of arguments raised by CSXT in *DuPont*, and UP in *USM* that have previously been rejected by the Board should also be rejected here.

3. Tank Car Size

Because Canexus' final offer comparison groups include all TIH commodities, they continue to include movements that utilize tank cars with capacities less than and greater than 22,000 gallons. Crowley/Stedman Reply VS at 14. Regardless of the parties' respective choices for the commodities in their comparison groups, the fact of the matter is that TIH commodities

[10] BNSF's Marketing News, available at: http://domino.bnsf.com/website/updates.nsf/15112060659dc96386256b02007f7bc9/95ddb32239fedd518625732c00744da7?OpenDocument

transported in tank cars have very few, if any, differences in transportation and demand characteristics. *Id.* Accordingly, a difference in the size of the tank car used to transport TIH commodities does not, in and of itself, make the movements less comparable. *Id.* Canexus' choice of a broader range of tank car size is therefore entirely appropriate.

4. Length of Haul

The issue movements travel [ ] miles (Glendale) and [ ] miles (Albuquerque) in the loaded direction. In assembling its comparison groups, Canexus utilized a mileage range of plus or minus [ ] miles, for the reasons discussed in its Opening Evidence. Canexus Op. at 10. In contrast, BNSF utilized a mileage range that resulted in its single comparison group containing movements as low as [ ] miles and as high as [ ] miles. BNSF Op. at Exhibit No. 8. The upper and lower ends of BNSF's range of miles result in a significantly higher mileage range than the Board has selected in prior cases. Nevertheless, as described above and in the Reply Verified Statement of Messes. Crowley and Stedman, Canexus elected to introduce some overlap between the parties' presentation by including in its final offer comparison groups the single line chlorine movements included in BNSF's opening comparison group. Crowley/Stedman Reply VS at 16-17.

5. Local vs. Rebilled Movements

Canexus' final offer comparison groups continue to consist of only single line, "BNSF local" movements. *Id.* at 15. There should be no dispute that the issue movements fall into this category. Price Authority BNSF 90096, Implementing Agreement 5000, effective March 16, 2011, contains the two rates being challenged in this proceeding. In this document, both movements show the route as "BNSF Direct."[11] Furthermore, all the movements between N.

[11] See Exhibit A to Canexus' November 14, 2011 Complaint.

Vancouver, BC, Canada and Glendale, AZ contained in the STB's Waybill Sample are classified as local movements meaning BNSF is reporting this movement as a local movement.[12] *Id.*

BNSF weakly claims that these movements are interline movements so it can justify the inclusion of interline movements in its single comparison group, presumably to try and bolster the small sample size produced by using only one year of Waybill Sample data. These claims should be rejected. BNSF admits that "For commercial purposes, *i.e.* rate setting and billing, the issue traffic movements are local movements that originate and terminate on BNSF." BNSF Op. at. 33. Since BNSF demonstrated that these movements are local for *rate* setting purposes, the only comparable movements that can be used to determine the maximum reasonable *rates* under the Three-Benchmark methodology would have to be other local movements. As explained further at pages 15-16 of the Crowley/Stedman Reply VS, BNSF's strained arguments that the issue movements should be considered interline movements have no merit.

In *USM*, the Board rejected the use of interline, re-billed movements in Three-Benchmark cases challenging the rates on chlorine movements that are considered by the railroad to be single line, local rates. BNSF's use of re-billed rates in its single comparison group is contrary to that rule and therefore further renders BNSF's opening comparison group inferior to Canexus' final offer comparison groups.

D. Calculation and Application of the Ratio of the RSAM and $R/VC_{>180}$

Consistent with the procedures they used in Canexus' Opening Evidence, Messrs. Crowley and Stedman applied the Three-Benchmark methodology. They calculated the revenue need adjustment for this proceeding using the four year average of BNSF's RSAM and $R/VC_{>180}$ from 2006 to 2009 contained in the STB's decision served on July 14, 2011 in Ex Parte No. 689

[12] The STB's Waybill Sample does not contain any N. Vancouver, BC, Canada to Albuquerque, NM movements.

(Sub-No. 2), *Simplified Standards for Rail Rate Cases – 2009 RSAM and R/VC$_{>180}$ Calculations.*[13] This application resulted in an adjustment of [ ] to the R/VC of each movement in the comparison groups. Crowley/Stedman Reply VS at Exhibit Nos. 10 and 11. Crowley/Stedman then calculated the maximum R/VC for each of the two issue movements following the procedures set forth in *Simplified Standards* by first adjusting each movement in each comparison group by the [ ] revenue need adjustment ratio, and then calculating the mean and standard deviation of the adjusted R/VC ratios for each comparison group. Using the mean and standard deviation of each comparison group, Crowley/Stedman next calculated the 90% confidence interval around the estimate of the mean to determine the upper boundary level of the mean estimate of each comparison group. The challenged rate is presumed unreasonable if the challenged rate's R/VC ratio is greater than the upper boundary mean of the adjusted comparison group. *Simplified Standards* at 21. To develop the maximum R/VC ratios for each issue movement, Crowley/Stedman relied on the STB's Upper Boundary Model (3 Benchmark Small Rate Cases). Crowley/Stedman VS at 17-19.

The table set forth below summarizes Crowley/Stedman's revised computations of the maximum reasonable rates and maximum R/VC ratios for the Glendale Movement and the Albuquerque Movement for the first quarter of 2011.

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[13] On February 27, 2012, the STB released a decision in Ex Parte No. 689 (Sub – No. 3), *Simplified Standard For Rail Rate Cases – 2010 RSAM and R/VC$_{>180}$ Calculations* which included RSAM and R/VC$_{>180}$ ratios for the four year average 2007-2010. Messrs. Crowley and Stedman did not use these ratios in their Reply VS calculations because they do not have access to the 2010 STB Waybill Sample traffic which would be needed in order to use the 2010 RSAM and R/VC$_{>180}$ ratios. Additionally, *Simplified Standards* do not allow the parties in a Three-Benchmark proceeding to deviate from the evidence included in opening to develop a reply comparison group.

Maximum Rate and R/VC 1Q 2011			
Ln	Item	Glendale	Albuquerque
1.	Issue Rate per Carload, including fuel surcharge	$15,251	$18,113
2.	Variable Cost - 1Q 2011	$5,084	$5,748
3.	R/VC ratio	300%	315%
4.	Maximum R/VC ratio	223%	218%
5.	Maximum Rate per Carload	$11,337	$12,531
6.	Amount BNSF Rate per Carload exceeds Maximum Rate per Carload	$3,914	$5,582

Crowley/Stedman Reply VS at 18, and related Verified Statement Exhibits and electronic work papers.

III. OTHER RELEVANT FACTORS

Applying the Three-Benchmark methodology utilizing Canexus' Final Offer Comparison Groups, the challenged rates to Albuquerque and to Glendale are "above a reasonable confidence interval around the estimate of the means for the adjusted comparison group" and therefore are "presumed unreasonable and, absent any 'other relevant factors,' the maximum lawful rate will be established at that boundary level." *Simplified Standards* at 21. The "other relevant factors" adjustments (up or down) are the sole means provided for in *Simplified Standards* to account for the regulatory lag inherent in the process due to its reliance on the Confidential Waybill Sample. *Id.* at 85.[14]

[14] In its Opening Evidence BNSF ominously asserts that as a result of *CSXT Transp., Inc. v. STB*, 594 F.2d 1076 (D.C. Cir. 2009) "whether the Board has adequately addressed the regulatory lag problem remains an open issue." BNSF Op. at 24. This is an overstatement of an essentially technical point. In that case, where the court vacated the Board's adoption of the four-year rule for Waybill Sample data on a technical procedural ground, the court also, as apparently a housekeeping matter, also vacated the portion of its prior decision discussing its approval of the Board's treatment of regulatory lag, since the two issues were somewhat related. *Id.* at 1083. In the prior case, the court upheld the Board's treatment of regulatory lag on three grounds: (1) the fact that rates are presumed unreasonable does not mean the opportunity to modify them is "illusory"; (2) quantifying the impact of "other relevant factors" after calculating the three benchmarks is reasonable; and (3) the prohibition on movement-specific adjustments or of product and geographic competition is reasonable. *CSXT Transp., Inc. v. STB*, 568 F.2d 236,

The burden to rebut this presumption and adjust the maximum reasonable rates upwards rests with BNSF, which must "quantify this evidence, so that the Board will have an objective, transparent means of adjusting the maximum lawful rate upwards or downwards." *Id.* at 77. However, the Board explicitly reserved the right to establish limits on such evidence so "that evidentiary disputes over 'other relevant factors' do not get out of hand and defeat the purpose of this simplified approach." *Id.* Significantly for this proceeding, the Board explicitly stated "we will not permit any evidence . . . of movement-specific adjustments to URCS." *Id.* at 22, 77-78 (emphasis supplied). Finally, in *Simplified Standards* the Board reserved the right "to proscribe other categories of evidence that would lead to complex or protracted litigation or otherwise significantly increase the expense of this simplified approach." As discussed in more detail below, the Board exercised this right in *USM*, where it proscribed the general category of proposed specific adjustments for Positive Train Control ("PTC") expenditures by the defendant railroad.

Canexus has proposed no adjustments to the presumptive maximum reasonable rate levels. In contrast, nearly half of BNSF's Opening Evidence is devoted to no fewer than four proposed upward adjustments based on claims of "other relevant factors." The percentage devoted to such proposed adjustments increases dramatically when one factors out the portions of BNSF's Opening Evidence including or referencing the 2011 BNSF TIH Traffic Data that was covered by the Board's February 8, 2012 Decision and Canexus' Motion to Strike. All of BNSF's proposed adjustments must be rejected. As summarized below, and discussed in more detail in the Reply Verified Statement of Crowley and Stedman, each one of the proposed

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247-248 (D.C. Cir. 2009). All things being equal, it seems highly doubtful that the court would change its mind on the Board's treatment of regulatory lag if a railroad was to appeal the *March 12 Decision*.

adjustments violates one or more of the following: (1) the Board's ruling denying the BNSF Motion; (2) the Board's categorical exclusion of PTC-related "other relevant factors" adjustments in Three-Benchmark cases; (3) the Board's explicit prohibition, consistent with its prohibition in rate cases generally, on making movement-specific adjustments to URCS; and (4) the overarching prohibition on presenting "other relevant factors" evidence that is overly complex and opens the door to the costly "battle of the experts" common to full Stand-Alone Cost cases that the Board explicitly has excluded from Three-Benchmark cases. Each of BNSF's proposed "other relevant factors" adjustments is discussed in turn.

A. "Current Rate Adjustment"

BNSF's first proposed adjustment is easily dispensed with, since the proposed "Current Rate Adjustment" does precisely what the Board specifically ruled on February 8 that BNSF could *not* do in this case: use selected, unverified[15] BNSF 2011 TIH traffic data from BNSF's files to prepare comparison group evidence in this case. In defiance of this order, BNSF's proposed "Current Rate Adjustment" is nothing more than an additional comparison group selected from the BNSF's 2011 TIH traffic data utilizing the flawed criteria used to select

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[15] As with BNSF's "preferred" comparison group, due to the Board's denial of the BNSF Motion, Canexus and its experts have not incurred the significant costs and undertaken the significant effort associated with verifying the BNSF-supplied data underlying this proposed adjustment or with preparing a detailed critique of its methodology. For example, the comparison group underlying this proposed adjustment is comprised of 1,177 chlorine movements pulled from 11,211 TIH movements. (BNSF Op. at 61). All of the costing data underlying this traffic data was supplied by BNSF, which would require a tremendous amount of time and effort to analyze and verify. This is precisely why the Board has steadfastly rejected railroads' repeated attempts to insert data from their own files into the Three-Benchmark realm. As the Board reiterated in the *March 12 Decision*, "the costs and delays associated with the collection, preparation, production, verification, and use of the carrier's most recent traffic data run counter to Congress' directive and the Board's objective of devising simplified procedures for use in small rate cases. Because relief in Three-Benchmark cases is limited, the costs associated with extensive discovery could significantly offset, or even eliminate, any rate reduction benefits from such cases and deter shippers from seeking relief." *March 12 Decision* at 5-6.

BNSF's 2009 comparison group, whose aggregate R/VC ratio BNSF then compares to BNSF's 2009 comparison group to produce a multiplier to increase the R/VC ratios. BNSF Op. at 61-62. This "other relevant factor" adjustment is simply an alternate means of producing the same result intended by BNSF's "preferred" comparison group, which is to insert prohibited current data from BNSF's files into the comparison process. BNSF acknowledges this fact, because this proposed adjustment would only apply to the maximum reasonable levels produced by applying the Three-Benchmark methodology using BNSF's 2009 comparison group. *Id.* at 56. It should therefore come as little surprise to the Board that the R/VC ratio produced by BNSF's "current rate adjustment comparison group" and proposed adjustment is nearly identical to the R/VC ratios produced by BNSF's preferred comparison group. Compare BNSF Op. at 8 to BNSF Op. at 62.

Because the Board ruled that the selected BNSF selected 2011 traffic data could not be used for comparison group evidence, the underpinning of the proposed "Current Rate Adjustment" fails, and with it the rest of the proposed adjustment. BNSF's proposed "Current Rate Adjustment" constitutes an attempted end-run around the Board's denial of the BNSF Motion by moving the comparison group analysis into the "other relevant factors" portion of the Three-Benchmark case. This is prohibited in this case due to the Board's denial of the BNSF Motion, and it should also be prohibited in future Three-Benchmark cases, for all the reasons the Board has consistently rejected the use of current, carrier selected traffic data in comparison group evidence.

Moreover, this proposed adjustment requires the Board to accept that BNSF's huge increases in TIH rates starting in 2011 were lawful and reasonable, a premise Canexus has vigorously disputed, both by filing this case, and in its reply in opposition to the BNSF Motion.

Just because Canexus is the first shipper to challenge those increases for some it its traffic does not make the increases to all other TIH rates presumptively reasonable. *See, e.g. March 12 Decision* at 7, note 16 ("R/VC ratios in the upper end of the comparison group 'might overstate a reasonable rate, as those rates might themselves be unlawfully high.'") *citing Simplified Standards* at 76.

Finally, in addition to being facially invalid, this proposed adjustment fails because it is entirely based on the Board's acceptance of BNSF's single 2009 comparison group, which Canexus has demonstrated is inferior to its final offer comparison groups.

B. "Historical PTC Adjustment"

BNSF has also proposed an alternative "other relevant factor" adjustment based on assertions that BNSF has installed PTC on parts of its system. This proposed adjustment must also be rejected. The numerous technical and legal flaws with the specific adjustment proposed by BNSF are briefly summarized below and discussed in greater detail in the Reply Verified Statement of Crowley/Stedman. However, there is no need to address the details of BNSF's proposed adjustment because the Board has previously ruled that the general category of purported costs incurred by the defendant to install PTC on the issue movements cannot be an "other relevant factor" in Three-Benchmark cases. More specifically, in *USM*, where the Board rejected a proposed PTC cost adjustment by UP, the Board stated that:

> accounting for the PTC investment is an issue too complex to resolve in a Three-Benchmark proceeding. Even if the costs could be captured effectively and efficiently distributed on a movement-by-movement basis, the same numbers would then need to be backed out of the R/VC ratio, adding a further complicated step. The Three-Benchmark methodology represents the smallest and simplest type of rate case in the Board's toolbox, and it must remain relatively straightforward and inexpensive to have any value.

USM at 17 (*citing Simplified Standards* at 22, 77).[16] In a footnote to this passage, the Board provided an additional important reason for rejecting PTC costs as an "other relevant factor," which is "[a]s the PTC investments are made, the costs will flow into our costing model and then into the rate prescription. To avoid a double count, we would need to find some way to remove those costs from our cost model, a massively complex project well beyond the scope of these simplified rate proceedings."

Thus, BNSF's "Historical PTC Adjustment" (as well as its Future PTC Adjustment) is barred under principles of collateral estoppel and the Board's rate reasonableness rules. *See e.g.* Ex Parte No. 347 (Sub – No. 3) *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, (served March 12, 2001)(parties are cautioned not to relitigate issues that have been resolved in prior cases); *DuPont* at 1 (where in the Three-Benchmark case CSXT unsuccessfully sought to relitigate issues settled in *Simplified Standards).*

As it ignored the Board's denial of the BNSF Motion, BNSF ignores the Board's prior decisional precedent that clearly precludes its proposed PTC adjustment and advances its own complex formulaic adjustment, which it proposes to apply to both PTC costs it represents it has already incurred, and future PTC costs it claims it will incur. Even if the Board was to consider the merits of this proposed adjustment, it completely fails to meet the "other relevant factor" standards for the reasons summarized below and discussed in greater detail in the Reply Verified Statement of Crowley/Stedman.

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[16] In *USM*, the Board faulted UP for "not sufficiently demonstrat[ing] the precise amounts that could be reasonably ascribed to USM's traffic or that USM's traffic has realized advantages from any PTC related upgrades." Significantly for the present case, however, the Board determined that even if UP had been able to overcome this hurdle, "accounting for the PTC investment is an issue too complex to resolve in a Three-Benchmark proceeding."

1. The BNSF's Historical PTC Adjustment is a Movement-Specific Adjustment to URCS That is Explicitly Barred by *Simplified Standards*

BNSF's "Historical PTC Adjustment" proceeds from the erroneous premise that "URCS does not properly attribute BNSF's historical PTC costs to the issue traffic and TIH movements." BNSF Op. at 64. BNSF then proceeds to propose an adjustment to the STB's URCS Phase III costs for the issue movements by purportedly converting PTC investments into URCS variable costs, which it then attempts to attribute to the issue movements. *Id.* at 70. In the first place, there is no support for BNSF's premise. On the contrary, the Board has stated "[c]urrently, PTC expenditures are incorporated into the R-1 Report under the category of 'capital investments and expenses;' however, PTC expenditures are not separately broken out." EP 706, *Reporting Requirements for Positive Train Control Expenses and Investments* (served October 13, 2011). In the second place, BNSF's "Historical PTC Adjustment" is, by definition and express design, a movement-specific adjustment to URCS variable costs, which the Board specifically said it would not permit "any evidence" of in Three-Benchmark cases, a decision that was expressly affirmed by the United States Court of Appeals for the District of Columbia Circuit. 568 F.2d at 248-249. *See* also Ex Parte No. 657, *Major Issues in Rail Rate Cases*, (served October 30, 2006). Crowley/Stedman Reply VS at 21-23 provides additional examples of the Board's refusal to permit movement-specific adjustments to URCS. Nowhere in BNSF's Opening Evidence does it even attempt to explain or justify why, despite the Board's express and consistent prohibition on movement-specific adjustments to URCS, BNSF's "Historical PTC Adjustment" is or should be exempted from this explicit prohibition.

2. BNSF's Historical PTC Adjustment is Arbitrary

BNSF's proposed adjustment would circumvent several regulatory and policy initiatives presently under consideration by the Board. Crowley/Stedman Reply VS at 23-25.

3. PTC Costs are Eventually Fully Recovered in URCS

As pointed out above, BNSF's statement that it does not recover all of its PTC expenses is wrong. In addition, as explained by Messrs. Crowley and Stedman, the Board's clearly articulated policy is that maximum reasonable rates for all traffic (TIH and non-TIH) that are subject to rate reasonableness regulation will change over time as the underlying URCS variable costs change. Crowley/Stedman Reply VS at 24; *USM*, supra at 17 ("[a]s the PTC investments are made, the costs will flow into our costing model and then into the rate prescription. To avoid a double count, we would need to find some way to remove those costs from our cost model, a massively complex project well beyond the scope of these simplified rate proceedings."). As PTC investment increases, it will be reflected in increased expenses, which in turn will increase the system average URCS variable costs, which will increase all prescribed rates. Crowley/Stedman Reply VS at 26. To permit movement-specific adjustments to increase the PTC components of URCS costs for TIH shippers would create an imbalance, and require the URCS variable costs used to calculate the maximum reasonable rates for other traffic, such as the rates the Board has prescribed for coal shippers, to be individually adjusted downward based on URCS costs that factored out PTC-related costs, lest there be a double count. *Id.*

4. The Evidence BNSF Presents in Support of its Adjustment is BNSF-Specific and Invites Evidentiary Presentations Well Beyond the Limited Scope of a Three-Benchmark Case

BNSF's proposed "Historical PTC Adjustment" also introduces certain assumptions and components that are highly contested and would require significant resources and "battles of the

experts" to address. *Id.* at 26. As Messrs. Crowley and Stedman explain, BNSF's "PTC-specific" versions of its Schedules 330 and 335 to BNSF's Annual Report Form R-1 were provided without any supporting workpapers breaking down the included costs, or any explanation of how the costs were developed. *Id.* at 26-27. Moreover, there is no industry consensus as to what constitutes a PTC-related cost or how those costs should be handled in the railroads' accounting procedures. *See Id.* (providing the example of how each of the Class I railroads treats "Wayside Devices" differently in their Positive Train Control Implementation Plans). These reporting issues are also the subject of EP 706, *supra*, which is pending. These unsettled, industry-wide issues obviously have no business being debated within the intentionally limited scope of a Three-Benchmark case, which "must remain relatively straightforward and inexpensive to have any value." *USM* at 17, *citing Simplified Standards* at 22, 27. Other than pointing out to the Board the flaws and pitfalls of this aspect of BNSF's proposed adjustment, Canexus has abstained from supplying detailed testimony and evidence refuting BNSF's evidence on this point.

5. The Proposed Adjustment Would Reverse BNSF's Acquisition Premium Accounting

In addition to the foregoing flaws with BNSF's proposed adjustment, it is directly contrary to BNSF's treatment of the acquisition premium paid by Berkshire Hathaway to purchase BNSF in 2010.[17] Crowley/Stedman VS at 28. Specifically, the BNSF PTC-related Schedules 330 and 335 line items used to try and allocate a historical PTC cost adjustment for Canexus traffic shows a [ ] increase in such costs from 2009 to 2010. *Id.* However, BNSF's Annual Report to the STB shows a [ ] decrease in costs for these same line items due to BNSF's adjustments to Schedules 330 and 335 to reflect the BNSF acquisition

[17] The transaction was announced in November, 2009 and closed in February, 2010.

premium. *Id.* This caused BNSF's 2010 BNSF URCS Phase III costs associated with these property accounts to be significantly lower than 2009 levels. BNSF is now impermissibly seeking to reverse the write down it took for the acquisition premium with its movement-specific adjustments to TIH variable costs. *Id.*

6. The Multi-Step Process Proposed by BNSF Violates Fundamental STB Costing Rules and Policy

Finally, at pages 28-33 of their Reply Verified Statement, Messrs. Crowley and Stedman provide a detailed catalogue of the numerous other technical flaws with each step of BNSF's proposed "Historical PTC Cost Adjustment," including but not limited to:

a. Selective replacement of system average costs with movement specific costs in violation of a key STB costing principle. (Step 1)

b. Allocating PTC costs using a methodology that is clearly biased toward over-allocating PTC costs to TIH traffic. (Step 2)

c. Impermissibly assigning PTC costs to the issue traffic but not to any other traffic in the BNSF comparison group. Specifically, BNSF's movement-specific adjustment through its four-step process applies only to the issue traffic. It is not applied to any of the comparison movements, in violation of clear principles recognized by the Board and the United States Court of Appeals for the DC Circuit.[18] (Step 3)

d. BNSF's Step 4 actually involves five additional steps in which selected system average costs selected by BNSF are removed from the URCS formula and replaced by surrogate costs calculated by BNSF. Although this in and of itself violates key costing principles, BNSF then distorts the result by again not making the same changes to all the movements in the comparison group, and then using as a multiplier the system average R/VC ratio of the comparison group.

* * *

[18] In upholding the Board's refusal to permit movement-specific adjustments in Three-Benchmark cases, the court stated "Further, using movement-specific adjustments in a three benchmark presentation would be even more cumbersome than the threshold market dominance determination, as it would require calculating movement-specific adjustments for every movement in the comparison group, not just the challenged movement." 568 F.2d at 249.

In summary, BNSF's proposed "Historical PTC Adjustment" is (1) precluded in its entirety due to the Board's exclusion in *USM* of this category of evidence in "other relevant factors" evidentiary presentations; (2) an attempted end run around pending Board regulatory and policy initiatives; (3) based on a premise that PTC expenses are not fully captured by URCS, a premise directly refuted by the Board's statement in EP 706; (4) a clear and unequivocal (and unapologetic) violation of the Board's strict prohibition on making movement-specific adjustments to URCS in rail rate cases generally and in "other relevant factors" evidence in Three-Benchmark cases explicitly; (5) a proposal that would require evidentiary submissions and related discovery and expert analysis on industry issues that range far beyond the narrow scope of this Three-Benchmark case; (6) contrary to BNSF's write down of its non-land assets to account for the acquisition premium paid by Berkshire Hathaway to purchase BNSF; and (7) inherently biased and distortive by over-allocating purported PTC expenses to the issue movements and then not applying any of the movement-specific URCS cost adjustments to any other movements in the BNSF comparison group.

Thus, there is absolutely no way that BNSF has provided the Board with any semblance of an "an objective, transparent means" to adjust the presumed maximum reasonable rates for PTC costs. Above all, however, the convoluted, complex, and severely flawed proposed "Historical PTC Adjustment" demonstrates the wisdom of the Board's decision in *USM* that "other relevant factors" evidence in a Three-Benchmark case cannot include PTC cost adjustments due to their complexity and disruptive effect on the use of the URCS costing model. There is no dispute that PTC expenses eventually flow through to the URCS costing system, and therefore PTC costs are accounted for in all rate reasonableness cases and maximum reasonable rates over a prescription period. Whatever imprecision might be present by using system

average URCS costs and the remainder of the Three-Benchmark method in regards to PTC cost recovery, BNSF and other railroad defendants cannot complain that none of their PTC costs are being accounted for and assessed the complaining shipper. As the Board stated in *USM*, the Three-Benchmark methodology represents the smallest and simplest type of rate case in the Board's toolbox, and it must remain relatively straightforward and inexpensive to have any value.

C. "Liability Risk Adjustment"

BNSF's third "other relevant factors" adjustment is a proposal to increase the presumed maximum reasonable rates to reflect purported increased insurance costs that BNSF attributes to TIH traffic. The alleged "other relevant factor" that supplies the basis for the proposed adjustment is "the high liability risk associated with the transportation of chlorine." BNSF Op. at 58. There is no precedent for such an adjustment to presumed maximum reasonable rates under the Three-Benchmark methodology. Indeed, that there are risks in transporting chlorine and other TIH commodities is an undisputed fact of the transportation market that has been true since such shipments began. BNSF provides no explanation why the mere existence of such risk, which as explained below has actually decreased in recent years, constitutes an "other relevant factor," and so this proposed adjustment should be rejected on that ground. In order to try and meet the requirement that adjustments based on alleged "other relevant factors" must be quantified and provide the Board with "an objective, transparent means" of adjusting the rates, BNSF attempts to calculate and then assign to the issue traffic "the incremental insurance costs attributable to [the issue] TIH traffic." *Id.* at 78. BNSF's attempted quantification proceeds from a flawed premise, and suffers from many of the same deficiencies as BNSF's PTC cost adjustment. At pages 33-39 of their Reply Verified Statement Messrs. Crowley and Stedman

review the numerous flaws with this proposed adjustment, which falls well short of the "other relevant factors" standards. These flaws include:

These flaws include that BNSF's adjustment proceeds from the erroneous premise that the insurance it purchases is the result of a *requirement* that it carry a certain amount of insurance for TIH commodities. This is not what the Board said in the Ex Parte No. 681 decision[19] cited by BNSF in its Opening Evidence (*See* that Decision at 2: transportation of hazardous material *may* require the carriers to pay higher insurance premiums), and BNSF makes no statements it is required to purchase certain levels of insurance for TIH in its Opening Evidence. *See* BNSF Op at 78. Rather, unlike the requirement that BNSF install PTC or that it comply with regulatory requirements for routing and handling of hazardous materials, the amount of insurance BNSF purchases is totally discretionary. Crowley/Stedman Reply VS at 34-35. Indeed, documents produced by BNSF in discovery demonstrate that BNSF's decisions regarding insurance for TIH are more driven by BNSF's ability to exert market power than any determinations that prior insurance levels were insufficient to cover TIH-related risks. *Id.* at 35. This is a very important distinction in the context of this case. If BNSF is permitted, as it proposes in its "Liability Risk Assessment," to arbitrarily decide (1) how much insurance to purchase; and (2) how much to arbitrarily allocate to TIH shipments, then there will be no incentive for BNSF to act prudently when purchasing insurance.

In addition to the foregoing, BNSF's proposed "Liability Risk Adjustment," or more accurately, its "incremental insurance cost adjustment," should be rejected for several other reasons:

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[19] Ex Parte No. 681, *Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials* (served January 5, 2009).

1. The adjustment suffers from the same fatal flaws as the proposed PTC adjustments, in that (a) it is an impermissible movement-specific adjustment to URCS costs; (b) it uses an arbitrary metric (loaded car-miles); (c) the adjustment is applied only to the issue movements, and no adjustment is made to the other movements in BNSF's comparison group; and (d) no adjustment is made to non-TIH movements to eliminate a double count. Crowley/Stedman Reply VS at 34.

2. BNSF provides no evidence that its insurance costs are the results of prudent business decisions. For example, while BNSF states that chlorine transportation "presents enormous risks," BNSF does not address how PTC and other regulatory requirements in recent years, as well as measures taken by TIH shippers (newer cars, positive hand-offs, increased inspection),[20] as well as BNSF's steps to reduce TIH cars on its system through rate setting and other measures, have and will continue to decrease the risks of transporting TIH commodities, and the effect of such developments on prudent insurance levels. *Id.* at 36.

3. BNSF ignores the fact that the risks of transporting TIH commodities (or any other commodity for that matter) increase as total traffic volumes of all commodities increase, thus it is illogical to assign 100% of risk to TIH commodity shipments.

4. Insurance premiums are expenditures under the Board's costing procedures that earn no return. BNSF's attempt to convert these expenses to variable costs results in BNSF triple-recovering these expenses through the issue rates. Specifically, under BNSF's proposed formula, BNSF would receive nearly [ ] from TIH commodity shippers even though BNSF asserts that only [ ] of its 2011 insurance costs were allocated to TIH commodities. This is nearly equal to the total amount of [ ] million BNSF represents it paid for all insurance in 2011. *Id.* at 37-38.

In summary, BNSF's proposed adjustment to allocate certain insurance costs to the issue movements, which BNSF has euphemistically called a "Liability Risk Adjustment," also fails the Board's standards for adjusting the presumed maximum reasonable rates based on an "other relevant factor."

D. "Future PTC Cost Adjustment"

Finally, BNSF proposes as an "other relevant factor" adjustment its projected future costs of installing PTC. This falls under the same prohibition as the proposed Historical PTC

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20 *See* Opening Verified Statement of Martin W. Cove at 2-4.

Adjustment, and so should be rejected on issue preclusion grounds. In addition, the mechanics of the proposed adjustment are the same as the Historical PTC Adjustment, so the Future PTC Adjustment suffers from the same fatal flaws. Moreover, as to future PTC costs, the Board confirmed in USM that it will not require a shipper to provide the carrier with a return on an investment that the carrier has not made, and that "there is a great deal of uncertainty surrounding PTC investment." *USM at* 17. There is no less uncertainty about PTC investment in 2012 than existed in 2009. In fact, there is arguably more uncertainty over whether, and the extent to which BNSF and the other Class I railroads will be required to install PTC on their systems. As one example, the Federal Railroad Administration is considering in its Docket. FRA-2011-0028, *Positive Train Control Systems*, whether to provide railroads responsible for installing PTC more authority to select what tracks PTC will have to be installed on by eliminating the "alternative route" and the "residual risk" tests for eliminating lines from a railroad PTC implementation plan.[21] If adopted, this rule could result in fewer tracks being designated by the railroads to require PTC installation. There is also pending federal legislation that would delay the date for implementation of PTC from December 31, 2015 to December 31, 2020, and further provide for alternatives to installing PTC on tracks that would otherwise require it under certain circumstances.[22] These examples are illustrative of the ongoing uncertainty surrounding PTC, and this uncertainty, coupled with the inherent flaws of BNSF' proposed "Future PTC Adjustment," supports the rejection of this proposed adjustment. As stated above, to the extent BNSF incurs additional PTC-related costs, these will be reflected in its reports to the Board, and eventually flow through to the URCS costing model that drives the

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21 http://www.fra.dot.gov/rcc/content/pages/FRA%20PTC%20NPRM%20FR%20082411.pdf

22 H.R. 7, The American Energy and Infrastructure Jobs Act of 2012, Section 8401; http://docs.house.gov/billsthisweek/20120213/CPRT-112-HPRT-RU00-HR7RCP.pdf (Rules Committee Print)

maximum reasonable R/VC ratios for the issue movements, thereby enabling BNSF to recover its future PTC costs during the five year prescription period.

IV. CONCLUSION

In conclusion, the Board should accept Canexus' Final Offer Comparison Groups to use in applying the Three-Benchmark methodology to determine the presumed maximum reasonable rate levels for the Glendale Movement and the Albuquerque Movement. Moreover, the Board should reject all of BNSF's proposed adjustments to the presumptive maximum R/VC ratios and rates based on the presence of "other relevant factors" as defined by *Simplified Standards*. After applying the Three-Benchmark methodology as advocated by Canexus, the Board should:

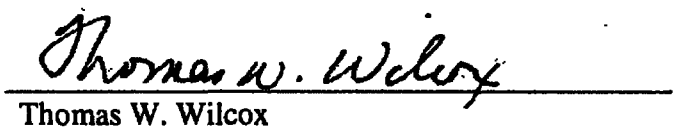
(1) find that BNSF's common carrier rates applicable to the transportation of chlorine between North Vancouver and Glendale, AZ and Albuquerque, NM are unreasonable;

(2) prescribe just and reasonable rates for the future applicable to the rail transportation of Canexus' traffic, pursuant to 49 U.S.C. §§ 10704(a)(1) and 11701(a);

(3) award Canexus reparations, plus applicable interest, in accordance with 49 U.S.C. §11704 for unlawful rates set by BNSF for the period beginning March 16, 2011 to the date BNSF establishes just and reasonable rates prescribed by the Board in this proceeding; and

(4) grant to Canexus such other and further relief as the Board may deem proper under the circumstances.

Respectfully submitted,



Thomas W. Wilcox
Edward D. Greenberg
Svetlana V. Lyubchenko
GKG Law, P.C.
1054 Thirty-First Street, NW, Suite 200
Washington, DC 20007
Phone: 202-342-5248
Fax: 202-342-5222

Attorneys for Complainant Canexus Chemicals Canada, L.P.

Dated: March 13, 2012

COUNSEL'S EXHIBIT 2

REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA, L.P. Complainant, v. BNSF RAILWAY COMPANY Defendant.	)	Docket No. NOR 42132

PART II – REPLY VERIFIED STATEMENT

Reply Verified Statement of Thomas D. Crowley, President, and Charles A. Stedman, Vice President, L.E. Peabody & Associates, Inc.

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Canexus Chemicals Canada, L.P.	)	
	)	
Complainant	)	
	)	
	)	
v.	)	**Docket No. NOR 42132**
	)	
	)	
The BNSF Railway Company	)	
	)	
Defendant	)	

REPLY
Verified Statement
Of

Thomas D. Crowley
President
And
Charles A. Stedman
Vice President
L. E. Peabody & Associates, Inc.

On Behalf of
Canexus Chemicals Canada, L.P.

Due Date: March 13, 2012

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LIST OF EXHIBITS

EXHIBIT NO. [1] (1)	DESCRIPTION (2)
8	Comparison of Canexus and BNSF Opening Evidence Comparison Groups for Glendale Movement
9	Comparison of Canexus and BNSF Opening Evidence Comparison Groups for Albuquerque Movement
10	Canexus Final Offer Comparison Group and Maximum R/VC Ratio for the Glendale, AZ Movement
11	Canexus Final Offer Comparison Group and Maximum R/VC Ratio for the Albuquerque, NM Movement

[1] Exhibit No. 1 through Exhibit No. 7 were included with our Opening VS.

I. INTRODUCTION

We are Thomas D. Crowley and Charles A. Stedman. We are the same Thomas D. Crowley and Charles A. Stedman who filed a verified statement in this proceeding on February 13, 2012 ("Opening VS") on behalf of Canexus Chemicals Canada, L. P. ("Canexus"). Our qualifications and experience are attached to our Opening VS as Exhibit No. 1 and Exhibit No. 2, respectively.

Canexus is requesting that the Surface Transportation Board ("STB" or "Board") prescribe reasonable rates, service terms and reparations associated with the transportation of chlorine via The BNSF Railway Company ("BNSF") for the following two (2) movements:

1. North Vancouver, British Columbia, Canada to Glendale, AZ ("Glendale Movement"); and
2. North Vancouver, British Columbia, Canada to Albuquerque, NM ("Albuquerque Movement").

In our Opening VS, we applied the STB's procedures for the Three-Benchmark Methodology specified in the STB's September 5, 2007 decision in Ex Parte No. 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* ("*Simplified Standards*") and provided the following information in support of Canexus' request:

1. The revenue / variable cost ("R/VC") ratio for each of the issue movements;
2. The selection of comparable BNSF movements from the STB's Unmasked Confidential Waybill Sample ("Waybill Sample") for BNSF for each year 2006 through 2009; and
3. The upper boundary of the R/VC ratio for the comparison group (referred to as the "Maximum R/VC Ratio") for each of the issue movements following the STB's procedures specified in *Simplified Standards*.

Simultaneous with the filing of Canexus' opening evidence on February 13, 2012, BNSF filed its opening evidence in this proceeding. In this reply statement, we critique and respond to BNSF's opening evidence and present Canexus' "Final Offer" comparison groups pursuant to the Three-Benchmark Methodology and the Board's procedures in *Simplified Standards*.

Our Reply verified statement ("Reply VS") summarizes the analyses we performed and the results of our analyses which are included under the following headings and in the accompanying Exhibits.

II. Revenue/Variable Cost Ratios for the Issue Movements

III. Canexus' Final Offer Comparison Groups and Revised Maximum Revenue/Variable Cost Ratios for the Issue Movements

IV. BNSF's Proposed "Other Relevant Factors" Adjustments to the Presumed Maximum Revenue/Variable Cost Ratios

II. REVENUE / VARIABLE COST RATIOS FOR THE ISSUE MOVEMENTS

The first step in the STB's Three-Benchmark analysis is to calculate the R/VC ratio for the issue movements. To develop a R/VC ratio, the rates and variable costs for each movement need to be developed. These three components were included in our Opening VS for 1Q11 for each issue movement and remain unchanged in this Reply VS. Use of 1Q11 variable costs was appropriate under the Board's procedures because the challenge rates were effective March 16, 2011. For reasons it does not explain, BNSF included these same components in its opening evidence for 4Q11. However, BNSF also included 1Q11 in its opening workpapers. Our critique of BNSF's opening evidence as it relates to rates, variable costs and R/VC ratios for the issue movements is discussed below under the following topics:

A. Rates for the Issue Movements;

B. Variable Costs for the Issue Movements; and

C. R/VC Ratios for the Issue Movements.

A. RATES FOR THE ISSUE MOVEMENTS

Canexus' 1Q11 rates (including the March 2011 fuel surcharge) for the issue movements are shown in Table 1, Line 1 below. BNSF's 1Q11 rate (including the March 2011 fuel surcharge) and 4Q11 rate (including the average 4Q11 fuel surcharge) for the issue movements are shown in Table 1, Lines 2 and 3 below.

Table 1
Comparison of Canexus and BNSF Rates Per Car (Including Fuel Surcharge) for Issue Movements

Item	North Vancouver to Glendale	North Vancouver to Albuquerque
(1)	(2)	(3)
1. Canexus Total Rate Per Car –1Q11 [1]	$15,251	$18,113
2. BNSF Total Rate Per Car – 1Q11 [2]	$15,251	$18,113
3. BNSF Total Rate Per Car – 4Q11 [3]	$15,445	$18,351

[1] Opening VS, Table 1
[2] BNSF Opening workpaper "2011 Issue RVC.xlsx"
[3] BNSF Opening, Table 2, page 22

As shown in Table 1 above, Canexus and BNSF agree on the issue rates for 1Q11. The difference between BNSF's 1Q11 and 4Q11 rates is caused entirely by the difference between BNSF's March 2011 fuel surcharge and BNSF's average 4Q11 fuel surcharge.

B. VARIABLE COSTS FOR THE ISSUE MOVEMENTS

In the STB's *Major Issues* decision,[1] the STB revised the variable cost procedures for rate complaints, deciding that variable costs would be calculated using the STB's Uniform Railroad Costing System ("URCS") Phase III cost program without adjustments. The STB also identified the nine inputs needed to calculate unadjusted variable costs for an issue movement. In our Opening VS, we followed the STB's procedures in calculating variable costs for the issue movements.

BNSF followed the same procedures in calculating variable costs for the issue movements in its opening. All of our inputs were the same for both issue movements.[2]

[1] Ex Parte No. 657 (Sub-No. 1) *Major Issues in Rail Rate Cases* ("*Major Issues*") decided October 30, 2006.

[2] Compare Table 2, page 5 of our Opening VS to Table 1, page 21 of the Opening Evidence of BNSF Railway Company both filed on February 13, 2012. As noted in our Opening VS at pages 5-6, we relied upon the nine inputs contained in BNSF's December 5, 2011 Disclosure. In reviewing BNSF's opening evidence, we found that, for the Glendale Movement, BNSF had decreased the miles for the BNSF origin leg by [ ] miles and increased the BNSF destination leg by [ ] miles. When combined, the BNSF two segments still equal the same total distance and, therefore, the BNSF's combined variable costs are the same.

Table 2 below summarizes the base year 2010, 1Q11 and 4Q11 variable costs[3] presented by both Canexus and BNSF for each of the two issue movements.

Table 2
Canexus and BNSF Calculation of
URCS Phase III Variable Costs Per Car

	Amount Per Car			
	North Vancouver to Glendale		North Vancouver To Albuquerque	
Item	Canexus 1/	BNSF 2/	Canexus 1/	BNSF 2/
(1)	(2)	(3)	(4)	(5)
1. Base Year 2010	$4,863	$4,863	$5,498	$5,498
2. 1Q11	$5,084	$5,084	$5,748	$5,748
3. 4Q11	-----	$5,303	-----	$5,996

1/ Opening VS, Table 3
2/ Lines 1 and 3 – BNSF opening, Table 2
Line 2 - BNSF opening workpaper "2011 Issue RVC.xlsx"

As shown in Table 2, Canexus and BNSF agree on the base year 2010 and 1Q11 URCS Phase III variable costs for the issue moves. We did not present 4Q11 variable costs and BNSF did not explain why it chose 4Q11[4] for its presentation.

C. R/VC RATIOS FOR THE ISSUE MOVEMENTS

Table 3 below shows the R/VC ratios for each issue movement as calculated by Canexus (1Q11 levels) and BNSF (1Q11 and 4Q11 levels).

[3] Both Canexus and BNSF relied upon the STB's BNSF URCS 2010 Phase III model to develop variable costs. In Docket No. FD 35506, *Western Coal Traffic League – Petition For Declaratory Order*, the STB is investigating the propriety of BNSF including an $8.1 billion premium in its 2010 URCS unit costs that Berkshire Hathaway paid to acquire the BNSF. Exclusion of the premium will reduce BNSF's variable costs and resulting maximum rates associated with handling the Canexus issue traffic.

[4] We have reviewed BNSF's development of the 4Q11 index values (from base year 2010) and note that BNSF's failure to round the PPI indexes in 4Q11 results in an understatement of the 4Q11 indexes.

Table 3
R/VC Ratios for the Issue Movements

Item (1)	North Vancouver To Glendale (2)	North Vancouver To Albuquerque (3)
1. Canexus R/VC Ratios - - 1Q11 [1/]	300%	315%
2. BNSF R/VC Ratios - - 1Q11 [1/]	300%	315%
3. BNSF R/VC Ratios - - 4Q11 [1/]	291%	306%

[1/] Table 1 rates divided by Table 2 variable costs.

As shown in Table 3 above, BNSF and Canexus' R/VC ratios for the issue movements are the same for 1Q11, while BNSF's R/VC ratios for 4Q11 are lower than the 1Q11 R/VC ratios. However, both Canexus and BNSF agree that the R/VC ratios for the two issue movements are significantly higher than the STB's jurisdictional threshold of 180%.

III. CANEXUS' FINAL OFFER COMPARISON GROUPS AND REVISED MAXIMUM REVENUE / VARIABLE COST RATIOS FOR THE ISSUE MOVEMENTS

The STB's decision in *Simplified Standards* specified the procedures to develop the Maximum R/VC Ratio for the issue movements using the Three-Benchmark Methodology. In our Opening VS, we presented the results of our initial analyses following the STB procedures. We have reviewed BNSF's opening evidence and based on that review, we have revised our opening evidence. Our revised analyses are summarized below under the following two topics:

A. Selection of Comparable Movements; and

B. Calculation of the Revised Maximum R/VC Ratio for Each Issue Movement.

A. SELECTION OF COMPARABLE MOVEMENTS

In our Opening VS,[5] we explained how we selected the comparable movements from the STB's Waybill Samples for 2006 through 2009 to develop comparison groups for each of the two issue movements. In its opening filing,[6] BNSF explained how it selected the single comparison group that it applied to both issue movements. In our Reply VS, we incorporate some of the features of BNSF's "alternative case" comparison group in developing our final offer comparison groups.

BNSF presented two cases in its opening evidence, *i.e.*, BNSF's "preferred case" and BNSF's "alternative case". BNSF's preferred case was based on BNSF-selected waybills from its internal files covering the March 16, 2011 through September 30, 2011 time period. BNSF's alternative case was based on the 2009 confidential Waybill Sample movements provided by the STB to the parties of this proceeding and for use only in this proceeding. As the STB has ruled that the use of 2011 BNSF internally selected waybill data cannot be used in this proceeding,[7] we

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[5] See our Opening VS at pages 8 through 10.
[6] See BNSF opening at pages 42 through 54.
[7] STB decision in Docket No. NOR 42132, *Canexus Chemicals Canada, L. P. v. BNSF Railway Company*, decided February 8, 2012.

ignore BNSF's preferred case in our reply evidence and concentrate on BNSF's alternative case.

Our discussion of the comparable movement selection process is contained under the following headings:

1. Comparison of Canexus' Two Comparison Groups to BNSF's Alternative Case Single Comparison Group;
2. Review of BNSF's Comparison Group; and
3. Canexus' Final Offer Comparison Groups.

1. Comparison of Canexus' Two Comparison Groups to BNSF's Alternative Case Single Comparison Group

In our Opening VS, we included two separate comparison groups, one for each issue movement. BNSF included only one comparison group in its alternative case and used it for both issue movements. We have developed a comparison of BNSF's single comparison group to the two comparison groups included in our Opening VS.

Exhibit No. 8 compares our opening comparison group for the Glendale Movement to the opening single comparison group presented by BNSF. Exhibit No. 9 compares our opening comparison group for the Albuquerque Movement to the opening single comparison group presented by BNSF. Exhibit No. 8 and Exhibit No. 9 are each broken into two sections. The first section (page 1 of each exhibit) lists the movements in our Opening VS comparison group while the second section (page 2 of each exhibit) lists the movements in BNSF's comparison group. As shown in Exhibit No. 8, there are no common movements in our Glendale group and BNSF's alternative case single comparison group. As shown in Exhibit No. 9, there is one common movement in our Albuquerque group and BNSF's alternative case single comparison group.

The differences in our comparison groups result from the different selection criteria applied by the parties on opening, coupled with the fact that the parties each used a different universe of movements from the STB Waybill Sample. Specifically:

1. Canexus used the four years of waybill data provided by the STB (2006-2009) while BNSF used only 2009 waybill data provided by the STB;

2. Canexus included chlorine and other TIH movements in its selection criteria while BNSF included only chlorine TIH movements;

3. Canexus excluded Glendale issue movements from the Glendale comparison group while BNSF excluded both Glendale and Albuquerque issue movements from its single group. Canexus excluded Albuquerque issue movements from the Albuquerque comparison group while BNSF excluded both Glendale and Albuquerque issue movements from its single group;

4. Canexus included only local movements while BNSF included both local and interline movements;

5. Canexus included movements in rail tank cars with less than and greater than 22,000 gallon capacity while BNSF included only rail tank cars with less than 22,000 gallon capacity; and

6. The mileage range used by Canexus to identify comparable movements was plus or minus 700 miles while the mileage range used by BNSF was plus [ ] miles and minus [ ] miles.

2. Review of BNSF's Comparison Group

Our review and critique of BNSF's comparison group, and how it relates to the comparison groups we included in our Opening VS are included below under the following topics:

a. Use of a Single Comparison Group;

b. Identification of Issue Movements;

c. Comparable STCC's;

d. Length of Haul;

e. Tank Car Size; and

f. Local Movements.

a. Use of a Single Comparison Group

BNSF's application of a single comparison group to two separate and distinct issue movements is contrary to *Simplified Standards*. In the discussion of the Three-Benchmark Methodology in *Simplified Standards*, the STB makes several references to "issue movement,"

"comparison group," and "challenged rate" in the singular.[8] *Simplified Standards* is clear that there must be a comparison group applicable to each "issue movement" or "challenged rate." As Canexus has challenged two separate issue movements, each with its own rate, a separate and distinct comparison group is required for each issue movement.

BNSF has not followed the STB's procedures. BNSF also has not followed STB precedent. The STB has recognized the need to have a separate comparison group for each challenged movement in each of the four previous three-benchmark proceedings.[9] In *DuPont Non-Haz*, *DuPont TIH* and *DuPont Haz*, each party submitted a separate final comparison group for each issue movement.[10] In *USM*, defendant Union Pacific Railroad Company ("UP") submitted one comparison group for both issue movements while the complainant submitted a separate comparison group for each issue movement.[11] In all four proceedings, the STB accepted complainant's comparison groups, *i.e.*, a separate comparison group for each issue movement.[12]

b. **Identification of Issue Movements**

Simplified Standards requires that issue movements be excluded from the comparison group for that movement. In our Opening VS, we identified issue movements in the Waybill Sample as any movement from the issue movement origin to the issue movement destination with the issue movement STCC. These movements were excluded from our comparison groups.

In BNSF's opening, BNSF identified issue movements in the 2009 Waybill Sample, and excluded them from its single comparison group, using the same criteria we followed except that,

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[8] See, for example, *Simplified Standards* at 6, 16, 17, 18, 20, and 21.

[9] STB Docket No. 42099 *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.* ("*DuPont Non-Haz*"), decision served June 30, 2008; STB Docket No. 42100 *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.* ("*DuPont TIH*"), decision served June 30, 2008; STB Docket No. 42101 *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.* ("*DuPont Haz*"), decision served June 30, 2008; and STB Docket No. 42114 *US Magnesium, L.L.C. v. Union Pacific Railroad Company* ("*USM*"), decision served January 28, 2010.

[10] See *DuPont Non-Haz*, DuPont and CSX March 5, 2008 Public Reply filings (page 15 and pages 33-34, respectively); *DuPont TIH*, DuPont and CSX March 5, 2008 Public Reply filings (pages 18-19 and 23-24, respectively; and *DuPont Haz*, DuPont and CSX March 5, 2008 Public Reply filings (pages 14-15 and page 21, respectively).

[11] See *USM* decision at 2.

[12] See *DuPont Non-Haz* decision at 12; *DuPont TIH* decision at 10; *DuPont Haz* decision at 9; and *USM* decision at 12.

BNSF excluded from its single comparison group all Waybill Sample movements for both movements. Because BNSF developed only one comparison group, it effectively reduced the overall size of the sample available to perform the Three-Benchmark analysis.

In this Reply VS, we continue to utilize the issue movements exclusion approach that we followed in our Opening VS. Stated differently, in our final offer comparison group for the Glendale Movement included with this Reply VS, we have excluded all N. Vancouver to Glendale movements from the comparison group but have included any movements between N. Vancouver and Albuquerque as these movements are not issue movements for purposes of the Glendale Movement. We excluded the issue movements for the Albuquerque Movement in the same manner.

c. **Comparable STCC's**

One of the comparison group selection criteria identified in our Opening VS was that the commodity had to be classified as a TIH commodity by BNSF because the issue movements of chlorine are classified as TIH commodities. This criteria was based on the special handling requirements for TIH commodities when moved by railroad, and also because it is consistent with Board precedent.

In opening, BNSF restricted its comparable group to a single TIH commodity, *i.e.,* chlorine, STCC 2812815. In anticipation that Canexus' comparison groups would contain other TIH commodities consistent with past Three-Benchmark cases, BNSF's opening evidence contains a lengthy discussion as to why BNSF believes anhydrous ammonia movements are not comparable to the issue chlorine movements.[13] While BNSF presents considerable rhetoric concerning TIH commodities, it provided little substantive evidence to support this rhetoric.

The anhydrous ammonia movements included in Canexus' comparison groups moved on BNSF despite all of the so-called differences claimed by BNSF and, as such, are clearly comparable to the issue movements for purposes of the Three-Benchmark Methodology. As a

[13] BNSF did not compare chlorine to any TIH commodity other than anhydrous ammonia.

threshold point, it is obvious that BNSF treats chlorine and anhydrous ammonia similarly from a pricing standpoint which is a key test of comparability. Specifically, for the chlorine movements contained in Canexus' two comparison groups, the R/VC ratios range from a low of [ ] to a high of [ ]. For the anhydrous ammonia movements contained in Canexus' two comparison groups, the R/VC ratios also range from a low of [ ] to a high of [ ]. This identical range of R/VC ratios suggests that BNSF's pricing and costs of service for both commodities are very comparable. BNSF's unsupported claims of numerous factors causing the R/VC ratios for chlorine and anhydrous ammonia to be significantly different are therefore disingenuous. These alleged differences are discussed below.

BNSF claims that chlorine is different from anhydrous ammonia because there are different end users of each product. However, BNSF's discussion did not include a demonstration of how different end-users impacts BNSF development of rates or the calculation of variable costs, if at all.

BNSF claims that there are more viable substitutes for anhydrous ammonia than there are for chlorine. But again, BNSF failed to demonstrate the impact of this claim on the development of rates or the calculation of variable costs.

BNSF claims there are more transportation alternatives available to anhydrous ammonia than chlorine. BNSF's third argument is more rhetoric coupled with a continued failure to demonstrate the impact on the development of rates or variable costs.

BNSF claims that chlorine and anhydrous ammonia have different transportation characteristics. BNSF claims that that these commodities are different because they travel in different size tank cars. The fact that TIH commodities travel in different size tank cars does not make them different. This position is akin to saying that coal traveling in a 100-ton hopper car is different than coal traveling in a 130-ton hopper car simply because the size of the car is different.

BNSF claims that these commodities are different because chlorine is more toxic than

anhydrous ammonia. This argument is ludicrous as both substances can be lethal. Both commodities are identified as TIH and both are handled in the same manner by the railroad. All TIH-handling rules promulgated by the government and BNSF are equally applicable to all TIH commodities including chlorine and anhydrous ammonia.

Despite the probative evidence in the STB's Waybill Sample data demonstrating the contrary, BNSF claims that there are pricing differences between the rates for chlorine and anhydrous ammonia. BNSF's only attempt to support this claim is the statement that these commodities are priced by two different marketing groups within BNSF. BNSF provided no demonstration whatsoever on how the rates for each commodity are developed and that they are developed differently.

BNSF has not demonstrated or quantified how any of these so-called differences impact the rates and variable costs for the movement of these two commodities. The bottom line is that anhydrous ammonia is classified as a TIH product just like chlorine, is handled by BNSF as a TIH product just like chlorine, is dangerous if leaked just like chlorine, and, therefore, is comparable to chlorine from a railroad transportation perspective.

Our final offer comparison group for each issue movement includes all TIH movements from the Waybill Sample that meet the specified selection criteria for each particular issue movement.

d. <u>Length of Haul</u>

In our Opening VS, we explained that one of our selection criteria for comparable movements was loaded miles within a range of plus or minus [ ] miles of the issue movement loaded miles. This resulted in mileage ranges of [ ] to [ ] miles for the Glendale Movement, and [ ] to [ ] miles for the Albuquerque Movement.

In opening, BNSF's selection criteria was considerably broader, *i.e.*, BNSF included movements in the comparison group with mileages as low as [ ] miles and as high as [ ]

miles. The difference in length of haul for the comparable movements is the main reason why Canexus' opening comparison groups did not include many of the movements selected by BNSF.[14]

e. **Tank Car Size**

In our Opening VS, we included TIH movements in tank cars with a capacity of less than 22,000 gallons ("tanks < 22,000 gallons") and tank cars with a capacity of 22,000 gallons or greater ("tanks > 22,000 gallons"). BNSF included only tanks < 22,000 gallons. BNSF offered two reasons to support this decision. First, BNSF claimed that different size tank cars have different transportation characteristics and handle different commodities, which is why URCS has different costs for the two different categories. Second, all chlorine moves in tanks < 22,000 gallons. Each allegation is discussed below.

Tank cars are handled the same from a transportation perspective regardless of size. Tank cars with different TIH commodities are handled in the same manner pursuant to the same regulations regardless of size. A carload of chlorine traveling in a tank < 22,000 gallons is treated the same as a carload of anhydrous ammonia traveling in a tank > 22,000 gallons because they are both TIH commodities.

The fact that URCS has two cost categories for tank cars is merely an attempt by the URCS formula to refine the Board's system average cost calculations. This does not mean that comparable commodities cannot move in both car types. URCS has different costs for open top hopper cars and gondola cars but both car types carry similar products and are handled in the same manner during transportation. The impact of different costs can be covered by different rates. This does not mean that the movements are not comparable. As noted above, the range of R/VC ratios for the anhydrous ammonia movements included in Canexus' comparison groups are identical to the range of the R/VC ratios for the chlorine movements included in the comparison groups.

BNSF's limitation on car size is tied to its limitation on commodity. Chlorine travels in tanks < 22,000 gallons. Anhydrous ammonia travels in tanks > 22,000 gallons. BNSF's choice of

[14] See Exhibit No. 8 and Exhibit No. 9.

car type included in its single comparison group is a function of BNSF's choice to limit the commodities included in its group to only chlorine. As demonstrated above, anhydrous ammonia movements are comparable movements to the issue movements and therefore, tanks > 22,000 gallons should be included in the comparison groups.

f. Local Movements

In our Opening VS, we included only local movements in our two comparison groups. This is because the two issue movements are represented by BNSF to be local movements. Price Authority BNSF 90096, Implementing Agreement 5000, effective March 16, 2011, contains the two rates being challenged in this proceeding. In this document, both movements show the route as "BNSF Direct."[15] Furthermore, all the movements between N. Vancouver, BC, Canada and Glendale, AZ contained in the STB's Waybill Sample are classified as local movements, meaning BNSF is reporting this movement as a local movement.[16]

Notwithstanding the foregoing, in opening BNSF claims that these movements are interline movements and then uses that claim in an attempt to justify the inclusion of interline movements in its comparison group. But then BNSF later admits that, "For commercial purposes, *i.e.* rate setting and billing, the issue traffic movements are local movements that originate and terminate on BNSF."[17] Obviously, rate setting is different for local and interline movements and BNSF does not dispute this fact but rather endorses it. Since BNSF demonstrated that these movements are local for **rate** setting purposes, the only comparable movements that can be used to determine the maximum reasonable **rates** under the Three-Benchmark methodology would have to be other local movements.

BNSF states[18] that the issue movements are originated by Canadian National at Canexus' North Vancouver facility and given "to BNSF at a location near Vancouver." For an unexplained reason, BNSF does not specify the location where this hand-off is performed. The move from the

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[15] See Exhibit A to Canexus' November 14, 2011 Complaint.
[16] The STB's Waybill Sample does not contain any N. Vancouver, BC, Canada to Albuquerque, NM movements.
[17] BNSF's opening, page 33.
[18] Id.

Canadian National to BNSF is a reciprocal switch. This type of terminal handling between railroads occurs at hundreds of locations throughout the U. S. and Canada and does not change a local movement to an interline movement. BNSF further claims that the Glendale movement is an interline movement as the Arizona and California Railroad handles the movement for [ ] miles between [ ]. As noted above, BNSF advertises this movement as a local movement and reports it to the STB as a local movement.

The specifics of the arrangement between BNSF and the Arizona and California Railroad were provided by BNSF in discovery.[19] BNSF provided documents which support Canexus' position that the movements that involve the Arizona and California Railroad are local movements to BNSF. These BNSF-provided documents show that [

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In our Reply VS, we continue to include only local movements in our final offer comparison groups.

3. Canexus Final Offer
Comparison Groups

Canexus' Final Offer comparison groups for each movement at issue are discussed below.

a. Modification to Opening
Comparison Groups

Modifications to Canexus' opening comparison groups and development of the final offer comparison groups are discussed below for each issue movement.

(1) Glendale Movement

Based on our review of BNSF's opening evidence, we have modified our opening comparison group of 41 movements for the Glendale Movement. That modification is to include all of the 2009 local chlorine moves included in BNSF's alternative case comparison group in order

[19] See BNSF bates numbered documents BNSF-GLEN-ALBQ 5011-5017, 5027-5040, 5048-5266 included in our Reply VS workpapers.

to introduce some overlap between the parties' comparison groups. These moves meet all of our opening evidence criteria with the exception that they are outside of our mileage band of +/- [ ] miles of the miles for the issue movement. In our Reply VS, we have expanded the mileage band to include BNSF's 2009 local movements over 500 miles.[20]

Exhibit No. 10 contains our final offer comparison group of 50 movements for the Glendale Movement. Of these 50 movements, 26 percent, or 13 movements, are chlorine traffic and the remainder are other TIH traffic.

(2) Albuquerque Movement

Based on our review of BNSF's opening evidence, we modified our opening comparison group of 23 movements for the Albuquerque Movement. That modification is the same as described above for the Glendale Movement, i.e., adding nine 2009 local chlorine movements from BNSF's single comparison group.

Exhibit No. 11 contains our final offer comparison group of 32 movements for the Albuquerque Movement. Of these 32 movements, 69 percent, or 22 movements, are chlorine traffic and the remainder are other TIH traffic.

B. CALCULATION OF THE REVISED MAXIMUM R/VC RATIO FOR EACH ISSUE MOVEMENT

To develop the revised Maximum R/VC Ratio for each issue movement, we followed the procedures set forth in *Simplified Standards*. First, as described above, we selected the final offer comparison group for each issue movement. Next, we multiplied the R/VC ratio for each comparable movement by the ratio of the BNSF RSAM and $R/VC_{>180}$ four-year average (2006-

[20] Due to the rules for comparison group selection included in *Simplified Standards*, we are precluded from including the same type of moves in years 2006-2008 in our Reply VS (local chlorine movements over 500 miles but less than the lower boundaries set for our two comparison groups) because we did not include them in our Opening VS (as they were outside of our specified mileage band) and BNSF did not include movements from 2006-2008 in its Opening comparison group. *Simplified Standards* states that the final offer comparison group can only be composed of movements submitted by either party on opening.

2009)[21]. We then calculated the mean and standard deviation for the adjusted R/VC ratios for the comparison group. Next, using the mean and standard deviation, we calculated the 90% confidence interval around the estimate of the mean to determine the upper boundary of the mean for the comparison group which becomes the threshold for determining if a rate is unreasonable.

Table 4 below compares our calculations of the issue movements' R/VC ratios to the Maximum R/VC Ratios calculated using the final offer comparison groups and following the STB's procedures.[22]

Table 4
Revised Maximum Rate for Issue Movements

	Item (1)	N. Vancouver to Glendale (2)	N. Vancouver to Albuquerque (3)
1.	1Q11 Rate per Car (Including Fuel Surcharge) [1]	$15,251	$18,113
2.	1Q11 Variable Cost per Car [2]	$5,084	$5,748
3.	R/VC Ratio [3]	300%	315%
4.	Maximum R/VC Ratio [4]	223%	218%
5.	Maximum Rate per Car [5]	$11,337	$12,531
6.	Amount BNSF Rate per Car Exceed Maximum Rate per Car [6]	$3,914	$5,582

[1] Table 1 above
[2] Table 2 above
[3] Line 1 ÷ Line 2 x 100
[4] Exhibit No. 10 and Exhibit No. 11
[5] Line 2 x Line 4
[6] Line 1 – Line 5

[21] See STB's July 14, 2011 decision in Ex Parte No. 689 (Sub-No. 2) *Simplified Standards* for *Rail Rate Cases – 2009 RSAM and R/VC$_{>180}$ Calculations*. On February 27, 2012, the STB released a decision in Ex Parte No. 689 (Sub-No. 3), *Simplified Standards For Rail Rate Cases – 2010 RSAM and R/VC$_{>180}$ Calculations* which included RSAM and R/VC $_{>180}$ ratios for the four year average 2007-2010. We did not use these ratios in our Reply VS calculations because we do not have access to the 2010 STB Waybill Sample traffic which would be needed in order to use the 2010 RSAM and R/VC$_{>180}$ ratios. Additionally, *Simplified Standards* do not allow the parties in a Three-Benchmark proceeding to deviate from the comparable movements included in opening to develop a final offer comparison group.

[22] The calculation of the final Maximum R/VC Ratio for each issue movement is shown in Exhibit No. 10 and Exhibit No. 11.

As shown in Table 4 above, BNSF's rate for each of the issue movements (Line 1) exceeds the rate based on the Maximum R/VC Ratio (Line 5) by $3,914 per car for the Glendale Movement and by $5,582 per car for the Albuquerque Movement.

IV. OTHER RELEVANT FACTORS

We did not include any proposed downward adjustments to the presumed maximum reasonable rates due to "other relevant factors" in our Opening VS. In this section of our Reply VS, we review and critique the four (4) proposed upward adjustments based on "other relevant factors" presented by BNSF in its opening evidence. As we demonstrate below, these four (4) BNSF adjustments are contrary to *Simplified Standards*, the Board's ruling in this case barring BNSF's use of internal 2011 TIH traffic data, and are obviously flawed. They are also based on detailed analyses of a tremendous amount of BNSF-generated data. Our critique below identifies the obvious flaws in BNSF's proposed adjustments that make them unusable for the stated purposes. Performing a more thorough critique of this evidence would be significantly more time consuming and prohibitively expensive for Canexus.

The Three-Benchmark maximum rate methodology was designed to be a straightforward, inexpensive means to provide captive shippers with relatively small cases some potential relief from the monopoly power of the Class I railroads. The captive shippers that use this maximum rate methodology understand that they are sacrificing some relief available through the application of the stand-alone cost and simplified stand-alone cost maximum rate methodologies, but do so in exchange for application of a straightforward, inexpensive alternative. Even though we have provided only a critique of the obviously apparent flaws of BNSF's adjustment, we spent a considerable amount of time on this aspect of BNSF's opening evidence. In our opinion, if the STB allows railroad defendants in future Three-Benchmark cases to introduce the high level of volume and detail submitted by BNSF in this proceeding in an attempt to justify an "other relevant factor" adjustment, the Three-Benchmark maximum rate methodology will cease to be a viable, ecomonical maximum reasonable rate alternative for shippers with relatively small disputes. Instead, the discovery and expert testimony relating to the "other relevant factors" component will dominate the analysis, at significant cost to complainants.

We address below the following four BNSF proposed adjustments:

A. Current Rate Adjustment;

B. Historical PTC Adjustment;

C. Liability Risk Adjustment; and

D. Future PTC Adjustment.

A. CURRENT RATE ADJUSTMENT

BNSF's "Current Rate Adjustment" is based on selected BNSF 2011 data from its internal files. As noted above, the STB has already ruled that selected partial year 2011 waybills from BNSF's internal files cannot be used in this proceeding. Therefore, we have not critiqued BNSF's Current Rate Adjustment because it is based on information which cannot even be considered in this proceeding pursuant to the STB's decision.

B. HISTORICAL PTC ADJUSTMENT

BNSF claims its Historical PTC Adjustment is a permissible "other relevant factor" adjustment because it is allegedly needed "to reflect the impact of BNSF's historical PTC costs on the maximum reasonable rate for movements of TIH."[23] BNSF justifies its adjustment based on a false claim that the Board has acknowledged that "URCS does not adequately attribute the PTC costs incurred by BNSF to the TIH traffic responsible for those costs." [24]

BNSF's Historical PTC Adjustment fails at the outset because it is a movement-specific adjustment to URCS variable costs that violates the Board's explicit direction that such adjustments are not permissible in rate reasonableness proceedings. This adjustment is a collateral attack on *Major Issues* and *Simplified Standards*. The STB has clearly and repeatedly limited the parties in rate reasonableness proceedings to the use of the unadjusted URCS Phase III movement costing

[23] BNSF opening, pg. 58
[24] *Id.*

program and disallowed movement-specific adjustments other than those automatically made by URCS Phase III program. A few examples follow:

> "The variable costs used in *rate reasonableness proceedings* will be the system-average variable cost generated by URCS, using the nine movement-specific factors inputted into Phase III of URCS." [25]

> "There are several underpinnings to this conclusion. First, as a matter of econometric theory, piecemeal or incomplete adjustments to URCS are suspect. There are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them. Indeed, many of the expense categories could not be changed, because movement-specific information is unavailable. Yet selective replacement of system-average costs with movement-specific costs may bias the entire analysis, rendering the modified URCS output unreliable."[26]

In *Major Issues*, the Board clarified that a key reason for its decision was that:

> "There are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them."[27]

In fact, the Board even extended this prohibition to Section 10705 complaints:

> "We do not, however, accept UP's locomotive and private rental car adjustments. These are precisely the kind of selective movement-specific adjustments to URCS that undermine the reliability of the costing model. Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 50-51 (STB served Oct. 30, 2006) (noting that piecemeal movement-specific adjustments were expensive and were not leading to a more accurate result than using the system-average figures). Just as we prohibit such piecemeal adjustments to URCS in rate cases, so too shall we prohibit such adjustments to URCS in § 10705 complaints."[28]

In addition to the clear prohibitions cited above, the Board further clarified that movement-specific adjustments generally, and movement-specific adjustments designed to allocate PTC-related costs to TIH shippers specifically, would not be allowed in Three-Benchmark rate cases. Examples include,

> "To keep these cases manageable, we must impose certain limits on the nature of the 'other relevant factors' evidence we will consider and the breath of discovery we will permit. ...nor will we permit evidence of movement-specific adjustments to URCS."[29]

> "Based on our experience in Full-SAC cases with product and geographic evidence and movement-specific adjustments to URCS[145], opening the door to such evidence would

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[25] *Major Issues*, p. 60, emphasis added.
[26] *Major Issues*, pp. 51-52.
[27] *Major Issues*, p. 51.
[28] *Entergy Arkansas, Inc. v. Union Pacific Railroad Co.*, STB Docket No. 42104, pp. 12-13, note 37 (served Mar. 15, 2011).
[29] *Simplified Standards*, p. 22.

> unduly complicate these procedures. Accordingly, we will not permit any evidence of... movement-specific adjustments to URCS."[30]
>
> "...we conclude that simplified guidelines can only be achieved by adhering strictly to the URCS model to calculate variable costs. We have imposed this limitation for all rail rate cases in Major Issues (at 23-27), the reasons for which we incorporate by reference here.
>
> This policy is especially necessary and appropriate in the context of a case brought under the Three-Benchmark approach. Our experience in Full-SAC cases demonstrates how substantial the discovery and litigation over movement-specific adjustments can be, and it is imperative that we minimize costs in small rail rate disputes."[31]

In addition, the Board specifically prohibited PTC-related movement-specific adjustments to URCS variable costs in *USM*:

> "Furthermore, accounting for the PTC investment is an issue too complex to resolve in a Three-Benchmark proceeding."[32]

The additional reasons why BNSF's historical PTC adjustment is inappropriate and obviously flawed are summarized below under the following headings:

1. BNSF's PTC Adjustment Is Arbitrary;
2. STB Policy Allows For Full Recovery of PTC Related Costs;
3. BNSF's Opening Evidence Attempts To Supplant STB Policy With BNSF's Philosophy;
4. BNSF's Adjustment Reverses BNSF's Acquisition Premium Accounting; and
5. BNSF's Four-Step Adjustment Process Is Flawed.

1. BNSF's PTC Adjustment is Arbitrary

BNSF states that "URCS does not properly attribute BNSF's historical PTC costs to the issue traffic and other TIH movements."[33] However, BNSF's methodology would only attribute purported historical PTC costs to the issue traffic, not to the other TIH traffic.

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[30] *Simplified Standards*, pp. 77-78 (footnote omitted).
[31] *Simplified Standards*, p. 84.
[32] *USM*, p. 17.
[33] BNSF opening, p. 64.

In addition, a Three-Benchmark rate reasonableness proceeding (or any rate reasonableness proceeding for that matter) is simply not the proper forum to decide the issue of whether PTC costs are properly attributed through the URCS Phase III costing program. As BNSF noted in its opening, the Board has initiated a proceeding[34] to determine whether PTC-related costs should be reported and treated separately in the railroads' annual report filings. This proceeding is ongoing and no decision has been made regarding whether and how these costs should be reported, much less how they may or may not be used in regulatory proceedings or the URCS costing model. BNSF arrogantly presumes that it knows: (1) that the Board will require separate reporting of PTC-related costs; (2) what information will be required/allowed to be filed and in which annual report schedules; and (3) how the Board will require those schedules to be used to adjust URCS variable costs in rate reasonableness proceedings.

Suggesting that the existence of the Board's Ex Parte No. 706 proceeding means the Board endorses movement-specific URCS adjustments in rate proceedings is a huge leap. The Ex Parte No. 706 proceeding is simply considering the implementation of a new cost reporting exercise that is not yet required. The STB has not made any statements regarding how the data will or should be used in rate proceedings or in URCS costing generally.

If BNSF believes the URCS Phase III costing program does not properly attribute PTC-related costs to TIH shipments, then BNSF should assert its belief in a proceeding initiated specifically to address the question of whether and how the URCS Phase III program should be altered to better account for the attribution of the subject costs. Until and unless that happens, the unadjusted URCS Phase III costs derived using the current factors and formulae should continue to be used in rate reasonableness proceedings.

Following current reporting requirements, PTC expenditures are incorporated into the Annual Report Form R-1 but are not identified separately from other capital or operating expenditures. The STB's proposed rule, which is supported by the railroads, would require Class I

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[34] STB Ex Parte No. 706, *Reporting Requirements For Positive Train Control Expenses and Investment.*

carriers to separately identify PTC expenditures in their Annual Report Form R-1.[35] However, the Board's proposed rule does not include a comparable, offsetting reporting mechanism for tracking PTC-related benefits, citing a lack of ability to easily identify the productivity gains attributable to PTC deployment.

Several independent parties, including the Federal Railroad Administration ('FRA"), project that significant operational and other business benefits are likely to accrue to the railroads as a result of PTC system implementation.[36] In their comments in Ex Parte No. 706, the railroads opposed developing a system to track, record, and monitor the benefits accruing as a result of PTC implementation until some unspecified time in the future, and cited uncertainties with respect to how the benefits might be measured and/or when they will be realized as reasons for their position on the issue.[37]

As the Board articulated in its *USM* decision when UP tried to implement a similar adjustment to reflect PTC-related costs:

> "UP has not sufficiently demonstrated... that USM's traffic has realized advantages from any PTC related upgrades."[38]

2. STB Policy Allows For Full Recovery Of PTC Related Costs

BNSF supports its historical PTC adjustment by claiming that, "It would be arbitrary for the Board to prescribe maximum reasonable rates in a manner that does not reflect BNSF's right to recover PTC expenses that it is required to incur by law. It would also be arbitrary for the Board to prescribe maximum reasonable rates in a manner that ignores the fact that PTC costs are directly attributable to TIH and passenger traffic and would not be incurred for other types of traffic."[39]

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[35] The proposed rule does not include any modification to the Uniform System of Accounts to explicitly define PTC expenses and assets.

[36] See: e.g., *Department Of Transportation, Federal Railroad Administration, 49 CFR Parts 229, 234, 235, And 236 [Docket No. FRA-2006-0132, Notice No. 1] RIN 2130-AC03, Positive Train Control Systems, Regulatory Impact Analysis*, dated December 8, 2009 at "Appendix A – Business Benefits". See Reply VS work paper "FRA-2008-0132-0060.1[1].pdf".

[37] Union Pacific Railroad Company's Reply to PPG Industries' Request to Expand the Scope of Proposed Rulemaking Proceeding to Adopt Reporting Requirements for Positive Train Control ("UP's Reply"), Docket No. EP 706, January 21, 2011.

[38] *USM*, p. 17.

These statements totally ignore the fact that BNSF is currently entitled to recover all of its PTC expenses under the existing Board policy defined in *Major Issues* and *Simplified Standards*. The Board's clearly articulated policy is that the maximum reasonable rates for all traffic (TIH and non-TIH) subject to rate reasonableness proceedings will change over time as the underlying URCS variable costs change. With PTC investment increasing the size of the railroads' investment base and thereby increasing their allowed return, the URCS variable costs, which include return on and return of investment as well as operating expense components, will also increase. In this way, rates on regulated TIH traffic (and other regulated traffic) will increase with the installation of PTC.

If the Board were to allow for an upward PTC cost adjustment on TIH traffic, it would need to require an offsetting downward PTC cost adjustment in all rate cases involving non-TIH traffic. For example, the STB rates prescribed in *KCPL*[40], *OGE*[41], *Western Fuels*[42], and *AEPCO*[43] for the movement of coal would need to be adjusted downward based on variable costs that factored out PTC-related costs.

3. BNSF's Opening Evidence Attempts To Supplant STB Policy With BNSF's Philosophy

In its opening,[44] BNSF presented a PTC-specific version of Schedule 330 to Annual Report Form R-1 that contains its PTC-related gross investment for four road property accounts (9, 16, 26 and 27) , three equipment accounts (52, 58 and 59) and construction work in progress (90) for calendar years 2009 through 2011. BNSF did not provide any supporting work papers that break down the reported amounts to component costs, nor did BNSF provide any explanation as to how these costs were developed. However, even if adequate supporting documentation had been

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[39] BNSF opening, p. 68.

[40] See STB's decisions in Docket No. 42095, *Kansas City Power & Light Company v. Union Pacific Railroad Company* ("*KCPL*").

[41] See STB's decisions in Docket No. 42111, *Oklahoma Gas & Electric Company v. Union Pacific Railroad Company* ("*OGE*").

[42] See STB's decisions in Docket No. NOR 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company* ("*Western Fuels*").

[43] See STB's decisions in Docket No. NOR 42113, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company* ("*AEPCO*").

[44] BNSF opening, p. 69.

provided, determination of which costs would be properly included in such a modified Schedule 330 would be subject to much debate which again has no place in a Three-Benchmark case. As discussed above, the Board's Ex Parte No. 706 proceeding seeks to determine whether separate reporting of PTC-related costs in the railroad's annual report is warranted. Even if the Board determines that separate reporting is warranted, there is no consensus as to what costs constitute a PTC-related cost or how those costs should be handled in the railroads' accounting procedures.

The railroads have been inconsistent in their reporting format and level of detail in their filed Positive Train Control Implementation Plans ("PTCIP").[45] Consider, for example, the section on "Wayside Devices." In a sample of several public PTCIP that we reviewed, we found the following inconsistencies. In BNSF's PTCIP, wayside devices are included in Section 10. That section does not contain a schedule for installation but does list the number of devices per subdivision. In UP's PTCIP, "Wayside Devices" are included in Section 9. That section contains a detailed list of devices and the schedule for installation. In Norfolk Southern Railway Company's ("NS") PTCIP, wayside devices are in Section 10. NS indicates the total number of devices only and refers to the general schedule section. In CSX Transportation's ("CSXT") PTCIP, wayside devices are in Section 9, which is mostly redacted. The railroads clearly have different approaches and philosophies for PTC-related reporting.

Furthermore, the Board's Ex Parte 706 Notice of Proposed Rulemaking makes clear that it has no immediate plans to use the reporting, if required, to alter in any way its URCS costing program:

> The Board recognizes that PTC expenses fall under the umbrella of the many issues in Class I Railroad & Financial Reporting—Transportation of Hazardous Materials. But nothing precludes the Board from extracting from that complex proceeding for more expeditious treatment the relatively straightforward issue of identifying PTC expenses while continuing to consider the remaining issues – including the regulatory uses to which PTC data may be put – separately.[46]

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[45] The railroads also have been inconsistent in their determinations about which information in the PTCIP is confidential.

[46] STB Docket No. EP 706, *Reporting Requirements For Positive Train Control Expenses And Investments*, October 13, 2011 Decision, p. 3.

4. BNSF's Adjustment Reverses BNSF's Acquisition Premium Accounting

BNSF's PTC-Related Schedule 330 and 335 line items are used to develop BNSF's Historical PTC Cost Adjustment that it applies to the Canexus issue traffic. For 2010, BNSF shows a [ ] increase in PTC costs (over 2009) in the seven (7) road property and equipment line items included.[47] BNSF seeks to allocate these increases exclusively to TIH and passenger traffic. Interestingly, BNSF's 2010 Annual Report to the STB shows a $12.023 billion decrease in total costs for these line items when 2010 is compared to 2009.[48] This is because BNSF adjusted Schedules 330 and 335 to reflect the acquisition premium paid by Berkshire Hathaway to purchase BNSF. BNSF wrote up the value of its land assets and wrote down the value of its property assets when it adjusted its books to reflect the acquisition premium. This accounting change resulted in the 2010 BNSF URCS Phase III costs associated with these property accounts to decrease significantly compared to 2009 costs.[49] In this case, BNSF is now proposing to increase its 2010 URCS Phase III costs associated with these accounts for a particular segment of traffic.[50]

The bottom line is that BNSF receives the benefit of the accounting change on its balance sheet from the Berkshire Hathaway acquisition but ignores the write-down (and in fact reverses it) with respect to developing its Historical PTC Cost Adjustment in this proceeding.[51]

5. BNSF's Four-Step Adjustment Process is Flawed

BNSF developed a four-step process that it used to allocate the PTC-related costs it developed and assigned in seven property accounts to TIH traffic. The flaws of each step are discussed below.

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[47] Including [ ] in expenditures and –[ ] in accumulated depreciation.

[48] Including -$6.551B in expenditures and -$5.472B in accumulated depreciation.

[49] In 2009, BNSF reported a combined closing balance of $27.5 billion in Schedules 330 and 335, and in 2010, BNSF reported a combined closing balance of $16.1 billion in Schedules 330 and 335. This is a 41% cost reduction.

[50] Figures developed in this paragraph are shown in Reply VS work paper "PTC 330 and 335_BNSF Opening CAN Rep v1.xlsx" at level "PTC 330 and 335".

[51] The overall impact of the Berkshire Hathaway premium is an $8.1 billion increase in BNSF's pre-acquisition book value. This $8.1 billion increase is included in BNSF's regulatory accounts and has been included in the STB's 2010 BNSF URCS formula.

a. STEP 1 – Adjust URCS

In Steps 1 and 2, BNSF attempted to convert the PTC investment expenditures to unit costs comparable to URCS variable costs. In Step 1, BNSF converted its statement of PTC-related Schedule 330 investment and associated Schedule 335 accumulated depreciation to aggregate variable capital costs. Essentially, BNSF identified a single expense category and replaced it with a substitute value that would be used to make a movement-specific adjustment to the issue traffic. This is expressly prohibited in *Major Issues*:

> "First, as a matter of econometric theory, piecemeal or incomplete adjustments to URCS are suspect. There are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them. Indeed, many of the expense categories could not be changed, because movement-specific information is unavailable. Yet selective replacement of system-average costs with movement-specific costs may bias the entire analysis, rendering the modified URCS output unreliable".[52]

Step 1, by itself, renders BNSF's four-step process indefensible.

b. STEP 2 – Allocate PTC Costs

In Step 2, BNSF allocates its calculation of PTC-related variable costs to the traffic that BNSF declares "is responsible for BNSF's obligation to install PTC, which... is limited to TIH and intercity and commuter passenger traffic."[53] This declaration is unfounded and self-serving.

In fact, the requirements for PTC installation on rail lines are based on three factors: (1) the presence of passenger traffic; (2) the presence of TIH traffic, and (3) minimum total volume requirements. Even if TIH moves over a line segment, there is no requirement to install PTC equipment unless there is enough total traffic volume (TIH plus non-TIH traffic) to warrant PTC installation per the governing regulations. It is the TIH traffic together with other freight traffic on the line segment that is responsible for BNSF's obligation to install PTC on a given segment.

BNSF makes an inappropriate comparison of its treatment of PTC costs to the URCS program treatment of intermodal terminal costs. BNSF notes that URCS allocates intermodal terminal costs only to intermodal traffic and not to non-intermodal freight traffic. BNSF attempts

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[52] *Major Issues*, pp. 51-52.
[53] BNSF opening, pp. 72-73.

to draw a parallel between that cost allocation and its proposed PTC cost allocation because it claims TIH traffic bears the full responsibility for the requirement to install PTC. The difference between the two circumstances is clear. The URCS treatment of intermodal terminal facility costs is justified because only intermodal traffic uses intermodal terminals. In contrast, TIH traffic is not the only traffic that uses rail lines on which PTC is installed.

BNSF's PTC cost allocation would be akin to saying that if BNSF extends a siding to accommodate long coal trains that use distributed power, none of the costs associated with the expansion should be allocated to any train that could fit on the siding before the expansion (*i.e.*, because a 75-car grain train does not physically park on the new siding extension, it should be allocated none of the costs, despite the fact that it is using the facility.) This suggestion is obviously preposterous. However, it is precisely the kind of adjustment BNSF is proposing.

BNSF allocates the PTC variable costs that it calculates to TIH traffic by: (1) determining the number of route miles associated with the 78 segments over which BNSF plans to install PTC systems; (2) determining route miles for those 78 segments over which passenger and TIH traffic move; and (3) developing a weighted allocation to passenger and TIH traffic based on the car-miles traversed by each group. The calculated allocation is 74% to TIH traffic and 26% to passenger traffic.

After the allocation is made, BNSF develops a PTC unit cost by allocating the TIH proportion of the total PTC-related variable costs to TIH movements on a per-loaded car mile basis by dividing the amount by the total loaded TIH car-miles over BNSF-owned segments during the year. This allocation is contradictory to the URCS costing model, as that model allocates costs to individual movements based on a combination of round trip gross ton-miles, locomotive unit miles and switch engine minutes required to move the traffic. BNSF offers no justification for its methodology other than that, "[f]or this allocation, Mr. Fisher concluded that PTC costs should be

assigned on the basis of loaded car-miles."[54] BNSF therefore makes two movement-specific adjustments to the URCS variable costs: one to the cost inputs; and another to the cost allocation methodology.

The mechanics of BNSF's allocation reveal the problems with its logic. Specifically, BNSF identifies 78 segments that will require PTC installation. However, BNSF's work papers show that TIH materials moved over [ ] segments.[55] TIH is clearly not solely responsible for the requirement to install PTC.

c. STEP 3 – Assign To Issue Traffic

In Step 3, BNSF assigns PTC investment costs to the issue traffic. However, BNSF does not make a similar offsetting adjustment to the costs of the movements in the comparison group. This treatment completely disregards the Board's clearly articulated position. As noted in the *Simplified Standards* decision:

> "However, because we are using URCS to develop the variable costs for the issue movement and the comparison movements, we will favor a comparison group that consists of movements of like commodities so the variable cost calculation of the issue movement and comparison group will be similar".[56]
>
> "Moreover, any adjustments that would be permitted would also need to be made to movements in the comparison groups, so as not to distort the comparison. But the similar movements would likely get similar adjustments, which could cancel each other out. See Burlington, 985 F.2d at 601 ('Thus, if the adjustment were made on both sides, it might well be pointless; if only on one side, it would create phony discrepancies')".[57]

In fact, BNSF has clearly created a phony discrepancy in its opening evidence. Despite the fact that BNSF's comparison group comprises only chlorine traffic, BNSF's four step process for adjusting the variable costs is applied only to the issue movements. It is not applied to any of the moves in BNSF's comparison group. The comparison movement R/VC ratios are based on system-average URCS variable costs that reflect no mark-up for PTC-related costs. In BNSF's opening analysis, the average R/VC ratio for BNSF's alternative case comparison group is 2.24 and the

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[54] BNSF opening, p 74.
[55] See Reply VS work paper "PTC SubDetail_BNSF Opening Rep v1.xlsx".
[56] *Simplified Standards*, p. 17.
[57] *Simplified Standards*, p. 84.

maximum R/VC ratio is 2.47 based on an average variable cost of [ ] per car. If the variable costs for BNSF's 26 TIH comparison group chlorine movements were adjusted based on BNSF's calculated variable PTC costs per mile for TIH traffic, the R/VC ratio for the comparison group would be restated to 1.68 and the maximum R/VC ratio would be restated to 1.85 based on an average variable cost of [ ] per car.[58]

If the Board were to accept BNSF's other relevant factor adjustment for the issue movements, it would also need to base the maximum R/VC figure on a substantially lower comparison group R/VC ratio that reflected incorporation of the PTC cost mark-up for all comparable moves. In BNSF's model, the comparison group movements are not assigned PTC costs while the issue movements are assigned PTC costs.

The Board recently considered this type of adjustment and rejected it:

> "Even if the costs could be captured effectively and efficiently distributed on a movement-by-movement basis, the same numbers would then need to be backed out of the R/VC ratio, adding a further complicating step."[59]

BNSF's Step 3 contains obvious critical flaws.

d. <u>STEP 4 – Application</u>

In Step 4, BNSF does two things: (1) it removes the system-average allocation of PTC investments; and (2) it calculates its other relevant factor ratios. In removing the system-average allocation of PTC investments, BNSF actually removes a portion of the seven road property and equipment accounts equal to the PTC-related expenses it has identified in its modified Schedules 330 and 335 from those accounts and develops the URCS unit costs associated with those accounts using the reduced values. The unit costs are allocated based on round trip gross ton miles, locomotive unit miles and switch engine minutes. The difference between the alternate unit costs and the unit costs developed through the URCS program is then applied to the issue moves.

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[58] See Reply VS work paper "STB 3B Model - Alt Case Albuquerque CAN Rep v1.xlsx" at tabs "UpperBoundary Summary Calc" and "Data used from Waybill".

[59] *USM*, p. 17.

BNSF then subtracts the system-average PTC-related variable costs and replaces them with its allocation (*based entirely on one-way car-miles*) of PTC-related variable costs to TIH movements only. BNSF then divides this inflated variable cost by the URCS Phase III variable cost to develop "other relevant factor" ratios ranging from 1.19 to 1.49 for the two moves in 2010 and 2011.

BNSF then multiplies these other relevant factor ratios by the 2.47 maximum R/VC ratio BNSF developed using the Three-Benchmark Methodology to develop adjusted maximum R/VC ratios ranging from 2.94 to 3.68 for 2011 and 2012 issue movements. Based on this adjustment, BNSF claims that no relief is warranted.

BNSF's Step 4 violates the Three-Benchmark Methodology rules on several levels. First, the replacement of system average costs with a surrogate cost is an impermissible movement-specific adjustment. Second, BNSF failed to make similar adjustments to the system average variable costs of its comparison group movements. Third, BNSF applied the adjustment based on an altered issue movement cost calculation to the maximum R/VC calculation it made based on system-average (non-altered) comparable moves.

C. LIABILITY RISK ADJUSTMENT

BNSF claims its liability risk adjustment is needed "to reflect the fact that a substantial portion of BNSF's insurance premiums are due solely to its transportation of TIH traffic." BNSF states that its adjustment serves to remedy a perceived problem with the URCS assignment of insurance expenses whereby "the rates for the 2009 Carload Waybill Sample movements in the comparison group therefore do not reflect an accurate assignment of insurance costs."[60] BNSF's liability risk adjustment factor suffers from the same problems discussed above for its historical PTC adjustment. Specifically:

[60] BNSF opening, pp 58-59.

1. BNSF's 'Liability Risk Adjustment' amounts to an impermissible movement-specific adjustment to the URCS costs that serve as the bedrock for all maximum reasonable rate proceedings, including Three-Benchmark cases;

2. BNSF's allocation of the expenses to TIH traffic is arbitrary and based on a metric (loaded car-miles) that is not used to allocate costs in the URCS program;

3. BNSF applies its 'Liability Risk Adjustment' only to the issue movements, and BNSF makes no adjustment to the variable costs of the comparison group movements. This uneven treatment of movements is expressly prohibited by *Simplified Standards* and reaffirmed by *USM*; and

4. BNSF makes no offsetting adjustment to non-TIH movements to ensure that BNSF does not double recover the costs it allocated to TIH shippers.

BNSF's Liability Risk Adjustment also suffers from several additional shortcomings as discussed below under the following topics:

1. BNSF's Liability Limits Are Set By BNSF, Not BNSF's Customers;

2. PTC Makes TIH Shipments Less Likely To Be Involved In Collisions/Derailments;

3. BNSF's Collision Risk Rises and Falls With Total Traffic Volumes; and

4. BNSF's Insurance Premiums Are Expenses, Not Investments.

1. BNSF's Liability Limits Are Set By BNSF, Not BNSF's Customers

Unlike BNSF's investment in PTC-compatible systems and equipment, which is required by Federal legislation and regulations, BNSF is free to carry any amount of insurance it feels is prudent. Part of BNSF's consideration in making that determination is how premium levels weigh against protection from liability afforded by the insurance. If BNSF is allowed to pass through all of its premium expense above a certain arbitrary limit that amounts to someone's guess about what BNSF would do in some non-real-world scenario, then BNSF is released from its obligation to make a sound business decision regarding the amount of liability insurance that is prudent for BNSF to carry. This is exemplified by an email produced by BNSF in discovery.[61] In this email, [ ] states:

[61] See "BNSF-GLEN-ALBQ00001107" which is included in BNSF's opening workpapers.

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Apparently, [ ] believes that because someone decided in 2008 that no more than [ ] in liability coverage would ever be needed in a pretend world where BNSF moved no TIH materials, then any increases to BNSF coverage limits in the future are directly attributable to TIH traffic. However, this is belied by the reason [ ] gave for the increase. Specifically, the increase was made because BNSF [

]. There was no discussion of the increase level as it relates to increases or decreases in risk associated with TIH traffic. Rather, BNSF made a business decision that it could and would spend more for increased liability coverage and then assumed that all of the increase in premium and coverage should be attributed to TIH shipments. BNSF offers no proof or even suggestion that the [ ] increase in liability coverage was made as a result of a determination that it had previously underinsured for TIH/PIH traffic exposure. BNSF's liability limit increase must be considered voluntary, not required, and certainly not attributable to TIH traffic.

2. PTC Makes TIH Shipments Less Likely To Be Involved In Collisions/Derailments

BNSF attributes dramatically increasing[62] [ ] PTC-related variable costs to TIH/PIH traffic for costs BNSF incurs as it expands its PTC coverage. This occurred because BNSF's aggregate PTC-equipped property expenditures increased. Nowhere in the history of the debate surrounding PTC implementation has any party ever opined that PTC implementation would increase the risk of collisions associated with the shipment of TIH/PIH or any other commodity. In fact, all parties universally agree that PTC

[62] See BNSF opening, Tables 13 through 15 (pp. 75-77).

implementation will make rail transportation safer, and incidents less likely to occur.[63] Therefore, as PTC-coverage expands, liability risk must necessarily fall.

BNSF's TIH/PIH volume levels, as measured by BNSF's preferred loaded car-miles metric, decreased by [ ] in 2011 [ ] compared to 2010 [ ].[64] Even absent the installation of PTC equipment, a reduction in TIH car-miles logically results in a reduction in liability risk associated with TIH movements. However, in BNSF's model, BNSF's liability risk attributable to TIH increased as its TIH traffic decreased. This is counter intuitive and demonstrates that BNSF's adjustment produces absurd results.

3. **BNSF's Collision Risk Rises and Falls With Total Traffic Volumes**

Just as there is decreased risk of an incident involving TIH traffic as TIH traffic volume decreases, there is an increased risk of an incident involving TIH traffic as total traffic volume increases. BNSF has made several public statements about its expectation that total traffic volumes are showing, and will continue to show, strong recovery and growth as the U.S. climbs out of recession.[65] For every incremental car BNSF places on its system, holding all other factors constant, the risk for a collision increases. Congested yards and capacity-constrained main lines make the risk of incidents involving all traffic more likely. This is precisely why the FRA placed a volume requirement (total volume, not TIH volume) on the lines on which it will require PTC implementation. Although an incident involving a TIH shipment may be more costly than one not

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[63] There is considerable disagreement among the parties as to the size and extent of the safety benefit associated with PTC implementation, but there is no debate that a safety benefit exists.

[64] See BNSF opening workpaper "TIH Insurance_BNSF Opening.xlsx".

[65] In January 2011, BNSF "reported a 20 percent increase in 2010 revenue and a 38 percent gain in operating income, topping $4.5 billion. That's the most profitable year in the company's long history." [See Fort Worth Star-Telegram, Texas, "BNSF is a success story -- just ask Warren Buffett," March 5, 2011, at http://www.star-telegram.com/2011/03/04/2897828/bnsf-is-a-success-story-just-ask.html#ixzz1eLoHDoTz accessed on March 6, 2012.] According to a January 2012 Progressive Railroading article, BNSF expects this trend to continue this year. "John Lanigan sums up his No. 1 goal for BNSF Railway Co. this year in three words: 'grow, grow, grow.' His No. 2 goal? 'More growth,' said BNSF's executive vice president and chief marketing officer on Dec. 5 in his Fort Worth, Texas, office." [See Progressive Railroading, January 2012, "BNSF expects shales, domestic intermodal and other promising sectors to propel 2012 traffic beyond GDP-growth level," at http://www.progressiverailroading.com/class_is-article/BNSF-expects-shales-domestic-intermodal-and-other-promising-sectors-to-propel-2012-traffic-beyond-GDPgrowth-levels--29410# accessed on March 6, 2012.]

involving a TIH shipment, that does not mean that the a TIH shipment will be more responsible than the non-TIH shipments it moves with in causing the incident. Therefore, the risk associated with incidents involving TIH is properly tied to the level of overall traffic moving on the BNSF system, not just TIH traffic.

For example, a traffic mix of 1,000 TIH shipments and 1,000,000 non-TIH shipments over a given segment may pose greater risk of a TIH-related incident than a traffic mix of 1,500 TIH shipments and 100,000 non-TIH shipments over the same segment. There is simply more risk of collision on a denser line segment, all else being equal. It is illogical to assign all risk to TIH shipments only.

4. **BNSF's Insurance Premiums Are Expenses, Not Investments**

Even if BNSF's allocation of insurance premiums to TIH traffic were valid, an adjustment to the R/VC ratio based on this allocation would not be the proper avenue for recovery of these costs. In fact, adjusting the prescribed R/VC ratio under BNSF's methodology would not only lead to BNSF's recovery of the insurance expenses it allocated to TIH traffic, it would allow BNSF to [ ]-recover the expenses.

As opposed to PTC-related investment, where BNSF purchased and installed equipment that will improve its operations and on which BNSF will earn a return, BNSF's insurance premiums are expenditures that will earn no return. In BNSF's model, BNSF allocates a net of [ ] in 2011 variable insurance costs to the Glendale movement and [ ] in 2011 variable insurance costs to the Albuquerque movement.[66] BNSF adds this allocation to the BNSF URCS Phase III variable costs for the movement and then compares this inflated variable cost to the system average variable cost to determine its other relevant factor ratio of 1.13 for the Glendale movement and 1.16 for the Albuquerque movement.

[66] See BNSF opening, Table 17 p. 80.

However, after this factor is calculated, BNSF applies it to the maximum R/VC ratio that BNSF calculated using the standard Three-Benchmark Methodology (2.47). BNSF compounds this overstatement by applying its insurance risk factor after it applies its historical PTC factor. BNSF's process and results are shown in Table 5 below.

Table 5
Demonstration of BNSF's [ ] Insurance Expense Recovery

	Item	Source	Glendale	Albuquerque
	(1)	(2)	(3)	(4)
1.	4Q 2011 Rate, Incl. FSC	BNSF opening, Table 2	$ 15,445	$ 18,351
2.	2011 VC	BNSF opening, Table 2	$ 5,303	$ 5,996
3.	2011 R/VC	Line 1 ÷ Line 2	2.91	3.06
4.	Revenue above VC	Line 1 - Line 2	$ 10,142	$ 12,356
5.	BNSF 3BM Max R/VC	BNSF opening, Table 6	2.47	2.47
6.	Max rate at 3BM level	Line 2 x Line 5	$ 13,080	$ 14,789
7.	Revenue above VC at 3BM level	Line 6 - Line 2	$ 7,777	$ 8,794
8.	2011 BNSF PTC Adj	BNSF opening, Table 14	1.19	1.25
9.	BNSF 3BM Max After PTC Adj	Line 5 x Line 8	2.94	3.08
10.	Max rate at PTC Adj level	Line 2 x Line 9	$ 15,565	$ 18,487
11.	Rev above VC at BNSF Adj level	Line 10 - Line 2	$ 10,262	$ 12,491
12.	Revenue from PTC Adjustment	Line 11 - Line 7	$ 2,485	$ 3,697
13.	BNSF Net PTC cost allocation	BNSF WP "PTC 330 and 335_BNSF Opening.xlsx"	[ ]	[ ]
14.	BNSF PTC Recovery above VC	Line 12 - Line 13	[ ]	[ ]
15.	2011 BNSF Ins Adj	BNSF opening, Table 17	1.13	1.16
16.	BNSF 3BM Max After PTC + Ins Adj	Line 9 x Line 15	3.30	3.58
17.	Max rate at PTC+ Ins Adj level	Line 2 x Line 16	$ 17,525	$ 21,436
18.	Rev above VC at BNSF Adj level	Line 17 - Line 2	$ 12,222	$ 15,440
19.	Revenue from Ins Adjustment	Line 18 - Line 11	$ 1,960	$ 2,949
20.	BNSF Net Ins cost allocation	BNSF WP "TIH Insurance_BNSF Opening.xlsx"	[ ]	[ ]
21.	BNSF Ins Recovery above VC	Line 19 - Line 20	[ ]	[ ]
22.	Percent of Insurance Expense recovered	Line 19 ÷ Line 20 x 100	[ ]	[ ]

Source: Reply VS workpaper "2011 Issue RVC Canexus Reply v1.xlsx".

As shown in the Table 5 above, BNSF's proposed other relevant factor does much more than allow for BNSF's recovery of the insurance premium expense BNSF allocates to TIH shippers. BNSF's model results in recovery of roughly [ ] times the insurance premium expense BNSF allocates to TIH shippers. To put this in perspective, BNSF allocates [ ] of its [ ] total liability expense to TIH shippers. Under BNSF's proposed liability risk other relevant factor adjustment, BNSF would be entitled to recover roughly [ ] in revenues on TIH shippers [ ] through this adjustment. The impact of

the adjustment is even more egregious in 2012, when it results in recovery of roughly [ ] times[67] the insurance BNSF allocates to TIH traffic. Therefore, under BNSF's proposed model, BNSF would recover nearly all of its liability premium expense in 2012 from TIH shippers only [ ]. This adjustment is clearly meant as a means to use TIH shipper revenues to subsidize almost all of BNSF's liability insurance expenses for all traffic.

D. FUTURE PTC ADJUSTMENT

BNSF includes a second PTC adjustment in its opening evidence which it calls its future PTC adjustment. According to BNSF, this future PTC adjustment utilizes the same four steps discussed above under its historical PTC adjustment to create an annual other relevant factor to apply to an STB maximum rate for TIH traffic following the Three-Benchmark Methodology. The numerous problems cited above in our discussion of BNSF's historical PTC adjustment apply equally to BNSF's future PTC adjustment.

[67] See: Reply VS work paper "2011 Issue RVC Canexus Reply v1.xlsx" at tab "compound".

Caption Question Concerning Groups for the Glendale, AZ Movement
(Source: 2006-2009 Confidential Waybill Sample - BNSF Movements)

REDACTED

BNSF Opening Comparison Group for Alternative Case - Glendale and Albuquerque 1/

REDACTED

Cement Origins Comparison Group for the Albuquerque, NM Movement
(Source: 2006-2009 Confidential Waybill Sample - BNSF Movements)

REDACTED

BNSF Ongoing Comparison Group for Alternative Case - Glendale and Albuquerque 1/

REDACTED

Canexus Final Offer Comparison Group and Maximum R/VC Ratio for the Glendale, AZ Movement
(Source 2006-2009 Confidential Waybill Sample - BNSF Movements)

REDACTED

Caseyns Final Offer Comparison Group and Maximum R/VC Ratio for the Albuquerque, NM Movement
(Source: 2006-2009 Confidential Waybill Sample - BNSF Movements)

REDACTED

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D. Crowley

Sworn to and subscribed
before me this 12th day of March, 2012

Helen M. Lunsford
Notary Public for the State of Virginia

My Commission Expires: May 31, 2015
Registration Number: 7507963

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, CHARLES A. STEDMAN verify under penalty of perjury that I have read the foregoing Verified Statement of Charles A. Stedman, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Charles A. Stedman

Sworn to and subscribed
before me this 12th day of March, 2012

Helen M. Lunsford
Notary Public for the State of Virginia

My Commission Expires: May 31, 2015
Registration Number: 7507963

CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of March, 2012, I have served a copy of the foregoing Complainant's Reply Evidence by email and hand-delivery upon counsel for Defendant at the following address:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Kathryn Gainey
Steptoe & Johnson LLP
1130 Connecticut Avenue, NW
Washington, DC 20036-1795

and by first-class mail to:

Richard E. Weicher
Jill K. Mulligan
Adam Weiskittel
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76151
(817) 352-2353

Thomas W. Wilcox